TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 111

GO-BART IMPORTING CO., PHILIP D. GOWEN, AND WILLIAM BARTELS, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 12, 1930

CERTIORARI GRANTED JUNE 2, 1930

(35,021)

(35,021)

SUPREME COURT OF THE UNITED STATES

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Complainant,

against

PHILIP D. GOWEN, alias "SLATER", alias "WATTS", ROYAL C. Gardiner, William Bartels, Patrick Smith, alias "Paddy", George Heath, John Howley, Count Francis de Polignac, Joseph M. Dooley, William Dooley, Ray Gardiner, John B. Hobby, "James" Most, First Name Fictitious, Chris Inteman, Arthur D. M. Cooley, George Levy, Joseph P. Stinard, Fred Schultz, "John" Moore, alias "Dinty", First Name Fictitious; George Flynn, alias "The Judge"; Charles Girassi, John Martinez, alias "Martini"; Max A. Gants, Arthur Mack, "Abraham" Spiegel, First Name Fictitious; Louis "Brown", Last Name Fictitious; Samuel "Smith", Last Name Fictitious; Yonkel "Levy", Last Name Fictitious; Nathaniel Johnson, Moses Lesser, Tony Frank, James "Jones", Last Name Fictitious; Robert Nelson, "Joseph" Girard, First Name Fictitious; "Richard Roe", Full Name Fictitious, the above names which are stated to be fictitious are so given for the reason that the full true names of these persons are unknown, Defendants

ORDER TO SHOW CAUSE—Aug. 22, 1929

Upon reading and filing the complaint herein verified by William J. Calhoun on the 5th day of June, 1929, the warrant of arrest herein issued by Honorable Garrett W. Cot-[fol. 2] ter on the 5th day of June, 1929, and the affidavits of Philip D. Gowen and William Bartels verified the 21st day of August 1929, together with the exhibits therein referred to and on motion of J. Edward Lumbard, Jr., attorney for the defendants Philip D. Gowen and William Bartels and for Go-Bart Importing Company, Inc., it is

Ordered,

1. That the United States of America, the complainant herein, show cause before this Honorable Court in Room

235, Old Post Office Building, Borough of Manhattan, New York City, on the 26th day of August, 1929, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an injunction should not issue enjoining and restraining the complainant and each of its officers, clerks, attorneys, agents, servants and employees, and all other persons acting under its authority or direction and each and every one of them and all in privity with them, from directly or indirectly using as evidence the papers and documents seized from the said Philip D. Gowen and William Bartels and Go-Bart Importing Company, Inc., as alleged in the said affidavits, or any information, notes or memoranda made from the search or investigation of such papers and documents, or any photostatic copies or reproductions made of such papers and documents.

2. That the United States of America, the complainant herein, show cause before this Honorable Court, at the same [fol. 3] time and place aforementioned, why an order should not issue directing the return of the said papers and documents to the said Philip D. Gowen, William Bartels and Go-Bart Importing Company, Inc.

3. That pending the entry of an order determining this motion, the complainant and each of its officers, clerks, attorneys, agents, servants and employees, and all other persons acting under its authority or direction, and each and every one of them and all in privity with them, be and they hereby are enjoined from directly or indirectly using as evidence the said papers and documents, or any information, notes or memoranda made from the search or investigation of such papers and documents, or any photostatic copies, or reproductions made of such papers and documents.

4. That copy of this order and the affidavits annexed thereto be served on the complainant on or before the 23rd day of August, 1929.

6. That the said Philip D. Gowen and William Bartels and Go-Bart Importing Company, Inc., have leave to file and serve such rebuttal affidavits or such papers and exhibits as they may desire on or before the hearing of this motion.

Dated New York City, August 22nd, 1929.

Charles A. Boynton, U. S. D. J.

[fol. 4] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF PHILIP D. GOWEN IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK,
County of New York, ss:

Philip D. Gowen, being duly sworn, deposes and says:

1. That he is one of the defendants in the within action.

2. That this motion is made for the purpose of obtaining an order directing the United States of America, the complainant herein, to restore to your deponent and to William Bartels and Go-Bart Importing Co., Inc., certain papers and documents wrongfully seized from your deponent and the said William Bartels and the said Go-Bart Importing Co., Inc., and to prevent the use in evidence against your deponent and the said William Bartels and the said Go-Bart Importing Co., Inc., of these documents and papers.

3. That the facts upon which the motion is based, so far as the seizure of documents from your deponent is concerned, are as follows:

[fol. 5] That for a long time prior to and on June 6th, 1929, deponent was an officer of Go-Bart Importing Company, Inc., to wit, its President. This Company is engaged in the business of importing, and has offices located at Room 1030—200 Fifth Avenue, New York, N. Y., within the Southern District of New York.

That on the 6th day of June, 1929, when your deponent entered the premises, at about eleven a. m., he found his office in the possession and under the control of three men, who stated that they were Government agents. Two of these men your deponent later learned were named O'Brien and Collins, and the third name is still unknown to your deponent. O'Brien stated to your deponent, that he had a warrant for your deponent's arrest and a warrant to search the premises. O'Brien thereupon exhibited a paper which he claimed was a search warrant and gave him a right to search. Your deponent requested him to leave a copy of the said papers with your deponent, but he refused to do so. Your deponent was permitted to read the paper which O'Brien exhibited but his request for a copy of the same

was refused. Upon your deponent's being placed under arrest his person was searched and miscellaneous papers and memoranda belonging to your deponent were seized. The agents also took from the person of your deponent some keys and under threat of breaking into your deponent's desk and his safe, forced your deponent to open his desk and his safe. From the desk and the safe they took various papers, documents and property belonging to and in the possession of your deponent, including journals, account books, letter files, insurance policies cancelled checks, [fol. 6] index cards and other miscellaneous property. Likewise, from other portions of the premises, they took papers, documents and property of a similar nature, belonging to your deponent.

Neither your deponent nor anyone on behalf of your deponent, nor anyone at the premises consented to search and seizure, but on the contrary the search and seizure was strenuously objected to. The government agents intimated, however, that if search and seizure were not consented to they would use force. The agents gave no receipts for any of the papers, documents or property taken from the premises or from your deponent.

After the said search and seizure your deponent was arrested and was arraigned on the said 6th day of June, 1929, before the United States Commissioner for the Southern District of New York, and held to answer on a complaint of conspiracy to violate the National Prohibition Act, in bail in the sum of Ten Thousand Dollars.

4. Your deponent is informed and verily believes that the three government agents were subordinates of William J. Calhoun, who, on information and belief, is Special Agent in Charge of Special Agents, Bureau of Prohibition, Treasury Department of the United States of America in charge of such agents operating in this the Southern District of New York.

5. Your deponent is further informed and believes that the aforesaid papers and documents were taken from the premises to the said office of the said William J. Calhoun at Room 2, Sub-Treasury Building, Wall and Nassau [fol. 7] Streets New York, N. Y., where said William J. Calhoun and his subordinates all of whom are government agents and employees, have been going over the same, to-

gether with Charles H. Tuttle, and his subordinates. That the said Charles H. Tuttle is United States Attorney for the Southern District of New York.

6. Your deponent is further informed and verily believes, that the paper which O'Brien and the other government agents described as a search warrant, was not a search warrant, but was in fact a warrant for the arrest of your deponent and other persons; that said warrant was directed to the Marshal for the Southern District of New York and to his deputies. Your deponent has annexed a copy of said warrant issued by United States Commissioner Garrett W. Cotter to these motion papers as Exhibit A.

7. Your deponent is further informed and verily believes that neither the Marshal nor any of his deputies, nor any person deputized by the Marshal for the purpose of executing said warrant, was present at the time said warrant was taken to Room 1030, 200 Fifth Avenue, where your deponent was placed under arrest.

8. Your deponent is further informed and verily believes that said warrant for the arrest of your deponent and for the arrest of others, hereto annexed as Exhibit A, was never recorded or delivered to the United States Marshal prior to the time of your deponent's arrest, and that it was in fact delivered to William J. Calhoun and/or one or more of his assistants, such as agents O'Brien and Collins; and [fol. 8] that the arrest of your deponent was illegal and in violation of his rights under the Constitution of the United States.

9. Your deponent is further informed by counsel and verily believes that there is a second reason why the arrest of your deponent and the search and seizure of his property was illegal, to wit, that the complaint filed before the United States Commissioner by William J. Calhoun, a copy of which is hereto annexed as Exhibit B, is insufficient in law in that it does not sufficiently state the crime with which your deponent is accused, and in that it is based on information and belief without disclosing the sources of such information and belief, and that it does not set forth facts showing that any crime is committed. For these reasons your deponent believes that the warrant issued by the United States Commissioner upon this complaint was im-

properly issued and void, and of no effect, and, therefore, that the arrest of your deponent was illegal and the search and seizure of your deponent's property was illegal and improper.

10. Your deponent is informed by counsel and verily believes that the records of your deponent have been used and are now being used by the said William J. Calhoun and the said Charles H. Tuttle, and their subordinates, and by other officers and agents of the United States for the purpose of securing further evidence against your deponent, and also for presentation to the Grand Jury.

11. Your deponent further contends that his arrest and [fol. 9] the search and seizure of his personal effects and records was illegal, in violation of his constitutional rights, and more particularly in violation of the Fourth and Fifth Amendments to the Constitution of the United States of America.

12. Your deponent further states that irremediable harm will occur to him if the alleged use of the said papers and documents by the Government is permitted to continue.

13. In view of these facts, it is respectfully requested that an order issue directing the complainant to return forthwith to your deponent, all papers and documents of your deponent which are in the possession of or under the control of the complainant as heretofore alleged, and further enjoining and restraining the complainant and each of its officers, clerks, attorneys, agents, servants and employees and all other persons acting under its authority or direction, and each and every one of them and all in privity with them, from directly or indirectly using as evidence the papers and documents seized from your deponent as heretofore alleged, or any information, notes or memoranda made from the search or investigation of such papers and documents, or any photostatic copies, or reproductions made of such papers and documents.

14. The reason why this application is made by order to show cause instead of by notice of motion is that your deponent is desirous of preventing the alleged use of the said papers and documents as evidence by the complainant pending the determination of this motion.

[fol. 10] That no previous application for this or any similar relief has been made to any Court or Judge thereof, except that your deponent commenced a suit in equity against Charles H. Tuttle, individually and as United States Attorney for the Southern District of New York, and William J. Calhoun, individually and as Special Agent in Charge of Special Agents of the Bureau of Prohibition, Treasury Department of the United States of America, and sought to enjoin the said Charles H. Tuttle and the said William J. Calhoun from using the said papers and documents seized as heretofore alleged as evidence against your deponent. The action also sought to compel the said defendants to return the said papers and documents to your deponent. Your deponent sought to obtain a preliminary injunction against the said Charles H. Tuttle and the said William J. Calhoun in the said action, and obtained an order from Mr. Justice Bondy, dated July 13, 1929, ordering the said Charles H. Tuttle and the said William J. Calhoun to show cause why they should not be so enjoined and why they should not be compelled to return the said papers and documents to your deponent. Subsequent to the time of the obtaining of this order to show cause by your deponent, the said Charles H. Tuttle and the said William J. Calhoun made a motion to dismiss the complaint in the equity action which your deponent had instituted. Pending the determination of the motion to dismiss, the hearing on the order to show cause was adjourned by consent.

The motion to dismiss came on before Judge Goddard, and in an opinion entered on the 16th day of August, 1929, he granted the motion to dismiss on the ground, as I am [fol. 11] informed by counsel and verily believe, that your deponent's proper remedy was by motion in a criminal proceeding instead of by independent suit.

Philip D. Gowen.

Sworn to before me this 21st day of August, 1929.
J. Cassin Healy, Notary Public, Westchester Co.
N. Y. Co. Clk's No. 593, Reg. No. 1H415. Commission expires March 30, 1931. (Seal.)

In United States District Court

Affidavit of William Bartels in Support of Order to Show Cause

State of New York,
County of New York, ss:

William Bartels being duly sworn, deposes and says:

1. That he is one of the defendants in the within action.

[fol. 12] 2. That this motion is made for the purpose of obtaining an order directing the United States of America, the complainant herein, to restore to your deponent and to Philip D. Gowen and to Go-Bart Importing Co., Inc., certain papers and documents wrongfully seized from your deponent and the said Philip D. Gowen and the said Go-Bart Importing Company, Inc., and to prevent the use in evidence against your deponent and the said Philip D. Gowen and the said Go-Bart Importing Company, Inc., of these documents and papers.

3. That the facts upon which the motion is based, so far as the seizure of documents from your deponent is concerned, are as follows:

That for a long time prior to and on June 6, 1929, deponent was an officer of Go-Bart Importing Company, Inc., to wit, its Secretary-Treasurer. This Company is engaged in the business of importing, and has offices located at Room 1030, 200 Fifth Avenue, New York, N. Y., within the Southern District of New York.

That on the said 6th day of June, 1929, at about 10:00 A. M., while your deponent was engaged at his business in the offices of the said Go-Bart Importing Company, Inc., three men entered the offices of the said Go-Bart Importing Company, Inc., and stated that they were members of the Department of Justice of the United States Government. Two of these men your deponent later learned were named O'Brien and Collins and the third man is still unknown to your deponent. Your deponent requested that they state their business, and O'Brien stated that he had a search warrant to search the premises. O'Brien thereupon ex-[fol. 13] hibited a paper which he claimed was a search warrant and gave him a right to search. Your deponent

requested him to leave a copy of the said paper with your deponent, but he refused to do so. The three Government agents thereupon proceeded to search the premises. Neither your deponent nor anyone on behalf of your deponent nor anyone at the premises consented to such search, but on the contrary the search and seizure were strenuously objected to. The Government agents intimated, however, that if search and seizure were not consented to they would use force. After a search of the premises and of your deponent, the Government agents seized and took from the premises three memorandum books and miscellaneous slips of paper belonging to your deponent.

The agents gave no receipt for any of the papers or records taken from the premises or from your deponent.

After the said search and seizure your deponent was arrested and was arraigned on the said 6th day of June, 1929, before the United States Commissioner for the Southern District of New York and held to answer on a complaint of conspiracy to violate the National Prohibition Act, in bail in the sum of Ten Thousand Dollars.

4. Your deponent is informed and verily believes that the three Government agents were subordinates of William J. Calhoun, who, on information and belief, is Special Agent in Charge of Special Agents, Bureau of Prohibition, Treasury Department of the United States of America in charge of such agents operating in this the Southern District of New York.

[fol. 14] 5. Your deponent is further informed and believes that the aforesaid papers and documents were taken from the premises to the said office of the said William J. Calhoun, at Room 2, Sub-Treasury Building, Wall and Nassau Streets, New York, N. Y., where said William J. Calhoun and his subordinates, all of whom are Government agents and employees, have been going over the same, together with Charles H. Tuttle, and his subordinates. That the said Charles H. Tuttle is United States Attorney for the Southern District of New York.

6. Your deponent is further informed and verily believes, that the paper which O'Brien and the other Government agents described as a search warrant, was not a search warrant, but was in fact a warrant for the arrest of your de-

ponent and other persons; that said warrant was directed to the Marshal for the Southern District of New York and to his deputies. Your deponent has annexed a copy of said warrant issued by United States Commissioner Garrett W. Cotter to these motion papers as Exhibit A.

7. Your deponent is further informed and verily believes that neither the Marshal nor any of his deputies, nor any person deputized by the Marshal for the purpose of executing said warrant, was present at the time said warrant was taken to Room 1030, 200 Fifth Avenue, where your deponent was placed under arrest.

8. Your deponent is further informed and verily believes that said warrant for the arrest of your deponent and for [fol. 15] the arrest of others, hereto annexed as Exhibit A, was never recorded or delivered to the United States Marshal prior to the time of your deponent's arrest, and that it was in fact delivered to William J. Calhoun and/or one or more of his assistants, such as agents O'Brien and Collins; and that the arrest of your deponent was illegal and in violation of his rights under the Constitution of the United States.

9. Your deponent is further informed by counsel and verily believes that there is a second reason why the arrest of your deponent and the search and seizure of his property was illegal, to wit, that the complaint filed before the United States Commissioner by William J. Calhoun, a copy of which is hereto annexed as Exhibit B, is insufficient in law in that it does not sufficiently state the crime with which your deponent is accused, and in that it is based on information and belief without disclosing the sources of such information and belief, and that it does not set forth facts showing that any crime is committed. For these reasons your deponent believes that the warrant issued by the United States Commissioner upon this complaint was improperly issued and void and of no effect, and, therefore, that the arrest of your deponent was illegal and the search and seizure of your deponent's property was illegal and improper.

10. Your deponent is informed by counsel and verily believes that the records of your deponent have been used and are now being used by the said William J. Calhoun and

the said Charles H. Tuttle and their subordinates, and by [fol. 16] other officers and agents of the United States for the purpose of securing further evidence against your deponent, and also for presentation to the Grand Jury.

11. Your deponent further contends that his arrest and the search and seizure of his personal effects and records was illegal, in violation of his constitutional rights, and more particularly in violation of the Fourth and Fifth Amendments to the Constitution of the United States of America.

12. Your deponent further states that irremediable harm will occur to him if the alleged use of the said papers and documents by the Government is permitted to continue.

13. In view of these facts, it is respectfully requested that an order issue directing the complainant to return forthwith to your deponent, all papers and documents of your deponent which are in the possession of or under the control of the complainant as heretofore alleged, and further enjoining and restraining the complainant and each of its officers, clerks, attorneys, agents, servants and employees and all other persons acting under its authority or direction, and each and every one of them and all in privity with them, from directly or indirectly using as evidence the papers and documents seized from your deponent as heretofore alleged, or any information, notes or memoranda made from the search or investigation of such papers and documents, or any photostatic copies, or reproductions made of such papers and documents.

[fol. 17] 14. The reason why this application is made by order to show cause instead of by notice of motion, is that your deponent is desirous of preventing the alleged use of the said papers and documents as evidence by the complainant pending the determination of this motion.

That no previous application for this or any similar relief has been made to any court or judge thereof, except that your deponent commenced a suit in equity against Charles H. Tuttle, individually, and as United States Attorney for the Southern District of New York, and William J. Calhoun, individually and as Special Agent in Charge of Special Agents of the Bureau of Prohibition, Treasury Department of the United States of America, and sought

to enjoin the said Charles H. Tuttle and the said William J. Calhoun from using the said papers and documents seized as heretofore alleged as evidence against your deponent. The action also sought to compel the said defendants to return the said papers and documents to your deponent. Your deponent sought to obtain a preliminary injunction against the said Charles H. Tuttle and the said William J. Calhoun in the said action, and obtained an order from Mr. Justice Bondy, dated July 13, 1929, ordering the said Charles H. Tuttle and the said William J. Calhoun to show cause why they should not be so enjoined and why they should not be compelled to return the said papers and documents to your deponent. Subsequent to the time of the obtaining of this order to show cause by your deponent, the said Charles H. Tuttle and the said William J. Calhoun made a motion to dismiss the complaint in the equity ac- [fol. 18] tion which your deponent had instituted. Pending the determination of the motion to dismiss, the hearing on the order to show cause was adjourned by consent.

The motion to dismiss came on before Judge Goddard, and in an opinion entered on the 16th day of August, 1929, he granted the motion to dismiss on the ground, as I am informed by counsel and verily believe, that your deponent's proper remedy was by motion in a criminal proceeding instead of by an independent suit.

William Bartels.

Sworn to before me this 21st day of August, 1929. J. Cassin Healy, Notary Public, Westchester Co., N. Y. Co. Clk's No. 503, Reg. No. 1H415. Commission expires March 30, 1931. (Seal.)

[fol. 19] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF WILLIAM BARTELS AS SECRETARY-TREASURER OF GO-BART IMPORTING COMPANY, INC., IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK,
County of New York, ss:

William Bartels being duly sworn, deposes and says:

1. That now and at all the times hereinafter mentioned, he was and is the Secretary-Treasurer of Go-Bart Importing Company, Inc., the petitioner herein.

2. That this motion is made for the purpose of obtaining an order directing the United States of America, the complainant herein, to restore to the Go-Bart Importing Company, Inc., Philip D. Gowen and William Bartels, certain papers and documents wrongfully seized from the Go-Bart Importing Company, Inc, the said Philip D. Gowen, and the said William Bartels, and to prevent the use in evidence against the said Go-Bart Importing Company, Inc., the said Philip D. Gowen, and the said William Bartels, of these documents and papers.

[fol. 20] 3. That the facts upon which the motion is based, so far as the seizure of documents from the said Go-Bart Importing Company, Inc., is concerned, are as follows:

That for a long time prior to and on June 6, 1929, deponent was an officer of the said Go-Bart Importing Company, Inc., to wit, its Secretary-Treasurer. The said Go-Bart Importing Company, Inc., is engaged in the business of importing and has offices located at Room 1030, 200 Fifth Avenue, New York, N. Y., within the Southern District of New York.

That on the said 6th day of June, 1929, at about 10:00 A. M., while your deponent was engaged at his business in the offices of said Go-Bart Importing Company, Inc., at the aforesaid Room 1030, 200 Fifth Avenue, New York, N. Y., within the Southern District of New York, three men entered the office of said Go-Bart Importing Company, Inc., and stated that they were members of the Department of Justice of the United States Government. Two of these men your deponent later learned were named O'Brien and Collins, and the third man is still unknown to your deponent. Your deponent requested that they state their business, and O'Brien stated that he had a search warrant to search the premises. O'Brien thereupon exhibited a paper which he claimed was a search warrant and gave him a right to search. Your deponent requested him to leave a copy of the said paper with your deponent, but he refused to do so. Neither your deponent, nor any one else on behalf of the said Go-Bart Importing Company, Inc., nor any one at the premises consented to such search, but [fol. 21] on the contrary the search and seizure were strenuously objected to.

The said government agents then proceeded to search the premises, and ransacked and searched a safe belonging to the said Go-Bart Importing Company, Inc., letter files of said Go-Bart Importing Company, Inc., and three desks on the premises belonging to the said Go-Bart Importing Company, Inc., and used by the various employees of the said Go-Bart Importing Company, Inc. After this search, the agents removed from the premises papers, documents and property belonging to the said Go-Bart Importing Company, Inc., including journals, account books, letter files, insurance policies, cancelled checks, index cards, and other miscellaneous property. It is impossible to give an exact list of the property removed because the agents gave no receipt for any of the papers or records taken from the premises.

After the said search and seizure, your deponent and one George Heath, an employee of said Go-Bart Importing Company, Inc., who was present during the said search and seizure, and one Philip D. Gowen, the President of said Go-Bart Importing Company, Inc., and one Ray Gardner, an employee of said Go-Bart Importing Company, Inc., who entered the premises while said search was in progress, were arrested and arraigned on the said 6th day of June, 1929, before the United States Commissioner for the Southern District of New York, and held to answer in bail on a complaint of conspiracy to violate the National Prohibition Act.

That your deponent, and the said George Heath, and the [fol. 22] said Philip Gowen, and the said Ray Gardner were the only employees and/or officers of said Go-Bart Importing Company, Inc., who were arrested at said premises.

4. Your deponent is informed and verily believes that the three government agents were subordinates of William J. Calhoun, who, on information and belief, is Special Agent in Charge of Special Agents, Bureau of Prohibition, Treasury Department of the United States of America in charge of such agents operating in this the Southern District of New York.

5. Your deponent is further informed and believes that the aforesaid papers and documents were taken from the premises to the said office of said William J. Calhoun, at

Room 2, Subtreasury Building, Wall and Nassau Streets, New York, N. Y., where said William J. Calhoun and his subordinates, all of whom are government agents and employees, have been going over the same, together with Charles H. Tuttle, and his subordinates. That the said Charles H. Tuttle is United States Attorney for the Southern District of New York.

6. Your deponent is further informed and verily believes that the paper which O'Brien and the other government agents described as a search warrant, was not a search warrant, but was in fact a warrant for the arrest of your deponent and the said George Heath and the said Philip D. Gowen and the said Ray Gardner. The said warrant was directed to the Marshal for the Southern District of New York and to his deputies. Your deponent has an- [fol. 23] nexed a copy of said warrant, issued by United States Commissioner Garrett W. Cotter, to these motion papers as Exhibit A.

7. Your deponent is further informed and verily believes that neither the Marshall nor any of his deputies, nor any person deputized by the Marshal for the purpose of executing said warrant, was present at the time said warrant was taken to Room 1030, 200 Fifth Avenue, New York, N. Y., where your deponent and the said George Heath and the said Philip D. Gowen and the said Ray Gardiner were placed under arrest.

8. Your deponent is further informed and verily believes that said warrant for the arrest of your deponent and the said George Heath and the said Philip D. Gowen and the said Ray Gardner, hereto annexed as Exhibit A, was never recorded or delivered to the United States Marshal prior to the time of said arrests, and that it was in fact delivered to William H. Calhoun and/or one or more of his assistants, such as agents O'Brien and Collins; and that the arrests of your deponent and of the said George Heath and of the said Philip D. Gowen and of the said Ray Gardiner were in violation of their rights under the Constitution of the United States.

9. Your deponent is further informed by counsel and verily believes that there is a second reason why the arrests of your deponent and of the said George Heath and

of the said Philip D. Gowen and of the said Ray Gardner and the search and seizure of Go-Bart Importing Com-
[fol. 24] pany, Inc., property were illegal, to wit, that the complaint filed before the United States Commissioner by William J. Calhoun, a copy of which is hereto annexed as Exhibit B, is insufficient in law in that it does not sufficiently state the crime with which your dependent and/or the said George Heath and/or the said Philip D. Gowen and/or the said Ray Gardner are accused, and in that it is based on information and belief without disclosing the sources of such information and belief, and that it does not set forth facts showing that any crime was committed. For these reasons your deponent believes that the warrant issued by the United States Commissioner upon this complaint was improperly issued and void and of no effect, and, therefore, that the arrests of your deponent and the said George Heath and the said Philip D. Gowen and the said Ray Gardner were illegal, and the search and seizure of said Go-Bart Importing Company, Inc., property were illegal and improper.

10. Your deponent is informed by counsel and verily believes that the records of the said Go-Bart Importing Company, Inc., have been used and are now being used by the said William J. Calhoun and the said Charles H. Tuttle and their subordinates, and by other officers and agents of the United States, for the purpose of securing further evidence against the complainant, and also for presentation to the Grand Jury.

11. The said Go-Bart Importing Company, Inc., further contends that the search and seizure of its records, documents and papers as aforesaid, was illegal, in violation of its constitutional rights and more particularly in viola-
[fol. 25] tion of the Fourth and Fifth Amendments to the Constitution of the United States of America.

12. The said Go-Bart Importing Company, Inc., states that irremediable harm will occur to it if the alleged use of the said papers and documents by the complainant is permitted to continue.

13. In view of these facts, it is respectfully requested that an order issue directing the complainant to return forthwith to said Go-Bart Importing Co., Inc., all papers

and documents of said Go-Bart Importing Company, Inc., which are in the possession of or under the control of the complainant as heretofore alleged, and further enjoining and restraining the complainant and each of its officers, clerks, attorneys, agents, servants and employees and all other persons acting under its authority or direction, and each and every one of them and all in privity with them, from directly or indirectly using as evidence the papers and documents seized from said Go-Bart Importing Company, Inc., as heretofore alleged, or any information, notes or memoranda made from the search or investigation of such papers and documents, or any photostatic copies, or reproductions made of such papers and documents.

14. The reason why this application is made by order to show cause instead of by notice of motion, is that said Go-Bart Importing Company, Inc., is desirous of preventing the alleged use of the said papers and documents as evi- [fol. 26] dence by the complainant pending the determination of this motion.

That no previous application for this or any similar relief has been made to any court or judge thereof, except that said Go-Bart Importing Company, Inc., commenced a suit in equity against Charles H. Tuttle, individually and as United States Attorney for the Southern District of New York, and William J. Calhoun, individually and as Special Agent in Charge of Special Agents of the Bureau of Prohibition, Treasury Department of the United States of America, and sought to enjoin the said Charles H. Tuttle and the said William J. Calhoun from using the said papers and documents seized as heretofore alleged as evidence against said Go-Bart Importing Company, Inc. The action also sought to compel the said defendants to return the said papers and documents to said Go-Bart Importing Company, Inc. Said Go-Bart Importing Company, Inc., sought to obtain a preliminary injunction against the said Charles H. Tuttle and the said William J. Calhoun in the said action, and obtain an order from Mr. Justice Bondy, dated July 13, 1929, ordering the said Charles H. Tuttle and the said William J. Calhoun to show cause why they should not be so enjoined and why they should not be compelled to return the said papers and

documents to said Go-Bart Importing Company, Inc. Subsequent to the time of the obtaining of this order to show cause by said Go-Bart Importing Company, Inc., the said Charles H. Tuttle and the said William J. Calhoun made a motion to dismiss the complaint in the equity action which said Go-Bart Importing Company, Inc., had [fol. 27] instituted. Pending the determination of the motion to dismiss, the hearing on the order to show cause was adjourned by consent.

The motion to dismiss came on before Judge Goddard and in an opinion entered on the 16th day of August, 1929, he granted the motion to dismiss on the ground, as I am informed by counsel and verily believe, that said Go-Bart Importing Company's, Inc., proper remedy was by motion in a criminal proceeding instead of by an independent suit.

William Bartels.

Sworn to before me this 21st day of August, 1929. J. Cassin Healy, Notary Public, Westchester Co. N. Y. Co. Clk's No. 593, Reg. No. 1H415. Commission expires March 30, 1931. (Seal.)

[fol. 28] Warrant of Arrest, Annexed as Exhibit "A", in Support of Order to Show Cause

Exhibit "A"

The President of the United States of America to the Marshal of the United States for the Southern District of New York and to his Deputies, or any or either of them:

Whereas, complaint on oath has been made to me, charging that Philip D. Gowen, alias "Slater", alias "Watts", Royal C. Gardiner, William Bartels, Patrick Smith, alias "Paddy", George Heath, John Howley, Count Francis de Polignac, Joseph M. Dooley, William Dooley, Ray Gardiner, John B. Hobby, "James" Most, Chris Inteman, Arthur D. M. Cooly, George Levy, Joseph P. Stinard, Fred Schultz, "John" Moore, alias "Dinty", George Flynn, alias "The Judge", Charles Girassi, John Martinez, alias "Martini", Max A. Gants, Arthur Mack, "Abraham" Spiegel, Louis "Brown", Samuel "Smith", Yonkel "Levy", Nathaniel Johnson, Moses Lesser, Tony Frank, James "Jones", Robert Nelson, "Joseph" Girard,

"Louis" Ruck, Fred Dohlander, "John Doe", "Richard Roe", did from the 1st day of January, 1929 to the 5th day of June in the year one thousand nine hundred and twenty nine at the Southern District of New York unlawfully, wilfully and knowingly combine, conspire, confederate and agree to commit an offense against the United States, namely to possess, barter, sell and deliver intoxicating liquor containing more than one half of one per cent. of alcohol by volume for use for beverage purposes, in violation of the Act of Congress approved October 28, 1918, [fol. 29] known as the National Prohibition Act and the United States Criminal Code, Section 37, as set forth in the Complaint this day filed in the office, a certified copy of which is hereto annexed, and made a part hereof, against the peace of the United States and their dignity, and against the form of the statute of the United States in such case made and provided.

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said persons above named and described and bring their bodies forthwith before me, or some Judge or Justice of the United States wherever in the Southern District of New York they may be found that they may then and there be dealt with according to law for the said offense.

Given under my hand and seal this 5th day of June, in the year of our Lord one thousand nine hundred and twenty nine.

Garrett W. Cotter, United States Commissioner for the Southern District of New York. (Seal.)

[fol. 30] COMPLAINT, ANNEXED AS EXHIBIT "B", IN SUPPORT OF ORDER TO SHOW CAUSE

Exhibit "B"

Approved: James Hendrick Terry, Assistant United States Attorney.

Before Hon. Garrett W. Cotter

[Title omitted]

SOUTHERN DISTRICT OF NEW YORK, ss:

William J. Calhoun, being duly sworn, deposes and says, that he is Special Agent in charge of Special Agents, Bu-

[fol. 31] reau of Prohibition, Treasury Department of the United States, and charged with the duties of enforcing the Act of Congress approved October 28, 1919, known as the "National Prohibition Act", and upon information and belief alleges:

That heretofore, to wit, beginning on January 1, 1929, and continuing on each and every day thereafter down to and including the date of the filing of this complaint at the City, County, State, and Southern District of New York, and within the jurisdiction of this court, Philip D. Gowen, alias "Slater", alias "Watts", Royal C. Gardiner, William Bartels, Patrick Smith, alias "Paddy", George Heath, John Howley, Count Francis de Polignac, Joseph M. Dooley, William Dooley, Ray Gardiner, John B. Hobby, "James" Most, first name fictitious, Chris Inteman, Arthur D. M. Cooley, George Levy, Joseph P. Stinard, Fred Schultz, "John" Moore, alias "Dinty", first name fictitious, George Flynn, alias "The Judge", Charles Girassi, John Martinez, alias "Martini" Max A. Gants, Arthur Mack, "Abraham" Spiegel, first name fictitious, Louis "Brown", last name fictitious, Samuel "Smith", last name fictitious, Yonkel "Levy", last name fictitious, Nathaniel Johnson, Moses Lesser, Tony Frank, James "Jones", last name fictitious, Robert Nelson, "Joseph" Girard, first name fictitious, "Louis" Ruck, first name fictitious, Fred Bohlander, "John Doe", full name fictitious, "Richard Roe", full name fictitious, hereinafter called the defendants, did unlawfully, wilfully, and knowingly combine, conspire, confederate, and agree together and among themselves and with divers other persons to your deponent unknown to commit a nuisance against the United States, [fol. 32] that is to say, to unlawfully, willingly, and knowingly possess, import, export, transport, barter, sell, furnish, deliver, solicit, and receive orders for intoxicating liquor containing more than one half of one percent. of alcohol, and fit and intended for use for beverage purposes in violation of and in a manner otherwise than as authorized by the Act of Congress approved October 28, 1919, commonly known as the National Prohibition Act and the acts amendatory thereof and supplemental thereto and the rules and regulations made pursuant thereto.

Overt Act

In pursuance of said conspiracy and to effect the objects thereof, on the 23rd day of May, 1929, the defendant, George Heath purchased one Peerless automobile.

Against the peace of the United States and their dignity and contrary to the form of the Statutes of the United States in such case made and provided (Section 37, U. S. C. C. Act of Congress, approved October 29, 1919, commonly known as the National Prohibition Act.)

(Signed) William J. Calhoun.

Sworn to before me this 5th day of June, 1929.
Garrett W. Cotter, United States Commissioner, S. D. N. Y.

[fol. 33] In United States District Court

Affidavit of Ernest Braidwood in Opposition to Order to Show Cause

State of New York,
County of New York,
Southern District of New York, ss:

Ernest Braidwood, being duly sworn, deposes and says:

I am a citizen of the United States and reside at an address which is in the possession of the United States Attorney's Office for the Southern District of New York.

Sometime in the month of March, 1927, I first became acquainted with the activities of the Go-Bart Importing Co., Inc., the office of which is located in Room 1030 of the premises 200 Fifth Avenue, City, County, State and Southern District of New York. This company had offices in a suite of three rooms, in which there were a safe, a large steel cabinet, a table and chairs and some other office furniture. I went to the aforesaid premises after being introduced over the telephone by a third person to a man named Philip D. Gowen, for the purpose of giving orders for, and purchasing and securing the delivery of intoxicating liquors. In the said premises of the Go-Bart Importing Co., [fol. 34] Inc., I met Philip D. Gowen and had a conversa-

tion with him regarding the possibility of buying intoxicating liquors. Philip D. Gowen introduced me to William Bartels at this time and told me that Bartels was his partner and that any time I wanted to order any liquor I could give orders for the same to William Bartels as well as to himself. In the course of the conversation, Gowen told me that they did not keep much liquor on the premises except odd lots or broken cases of liquor. Gowen took a bottle of Teachers Highland Cream Scotch Whiskey from the safe in one of the rooms of the suite in Room 1030 and gave me a drink of it as a sample. I am familiar with the color, taste and smell of intoxicating liquor and I know the liquid I tasted was whiskey and an intoxicating liquor containing more than one-half of one percentum of alcohol by volume and fit for use for beverage purposes. I then gave Gowen my order for one case of Teachers Highland Cream Scotch Whiskey and one case of Burke's Gin. I paid Gowen $125.00 in cash, $70.00 for the Scotch Whiskey and $55.00 for the Gin. I later had occasion to taste the whiskey and gin that I ordered from Gowen and being familiar with the taste of intoxicating liquors I know that I received whiskey and gin as represented.

After I gave the order, Gowen telephoned someone and then told me to go to a machine shop located in the basement of premises 26 East 22nd Street, City, County, State and Southern District of New York, where a man named "Willie", whose last name I later found to be Duckett, would be there to take care of me. I went over to this shop and "Willie" met me at the entrance and gave me two [fol. 35] packages which I took away with me, and which I later found to contain the whiskey and gin purchased by me from Gowen.

After this first transaction with Gowen and Bartels and the Go-Bart Importing Co., Inc., I continued my liquor dealings with them and with several others whom I shall hereinafter mention. My relationship extended over a period of eighteen months, during which time I gave at least forty orders for intoxicating liquor, which orders were filled and delivered and made payment for the same. I visited the aforesaid premises 200 Fifth Avenue on an average of twice a week.

I placed my orders for intoxicating liquor sometimes by telephoning the Go-Bart Importing Company, Inc., at their

listed telephone number, to wit, Gramercy 5978, and sometimes by going up to their office at 200 Fifth Avenue, above mentioned, and giving it in person. When I telephoned my orders for liquor, I adopted the name "Burke" because on the occasion of my first purchase of liquor, Philip D. Gowen told me to use the name "Burke" instead of my real name when I wanted to give any orders over the telephone. On the occasions when I telephoned my orders, I telephoned Gramercy 5978 and usually gave the order for liquor to Philip Gowen. I also have given my orders for intoxicating liquors over the aforesaid telephone to William Bartels, to George Heath and a couple of times to Roy Gardiner alias Charles Cramer. I know all of these men and have talked to them on many occasions both in person and over the telephone and have heard their voices over the telephone Gramercy 5978, and know that the persons I have named have [fol. 36] taken my orders for intoxicating liquors over the aforesaid telephone. The orders so given were later delivered and payment made for the same.

Whenever I called on the telephone and spoke to any of the aforementioned individuals, I inquired whether the price was the same for any order of intoxicating liquor that I gave them and whoever I happened to be speaking to at the time would tell me if there was any change. The various liquors I purchased and ordered from this group of individuals and the prices for the same are as follows: John Haig Scotch Whiskey, $75.00 a case, and later Haig and Haig Scotch Whiskey, $90.00 a case; Gin, between $42.00 a case up to $65.00 a case for House of Lord's Gin; Champagne, $90.00 a case for Pommery & Greno, Monopole and Lanson; Wines such as Burgundy, Port, Sherry and Sauterne, at $48.00 a case; Cordials, such as Benedictine, Chartreuse, Cointreau, at $96.00 a case; and Hennessy Brandy, at $96.00 a case. Most of my purchases were Scotch Whiskies but I have purchased some of the aforementioned and other liquors during the period of my dealings with the aforementioned individuals.

When I telephoned and spoke to either Gowen, Bartels, Heath, or Gardiner, I used the name of "Burke" and then gave my order for the particular liquor I wanted and asked about the price. Then whoever I happened to be speaking

to at the time would give me the desired price information and tell me when they would have the order ready to be taken away. Then I would go up to the premises of the Go-Bart Importing Co., Inc., at 200 Fifth Avenue. Sometimes my package or packages would be there for me to [fol. 37] pick up. On some occasions I would wait a few minutes and George Heath would bring in my packages from outside. On other occasions, William Bartels or Philip Gowen, whoever happened to be in the office, would tell me to go over to the machine shop previously mentioned as being located at 26 East 22nd Street, City, County, State and Southern District of New York. I have been in these premises on several occasions at such times when Gowen told George Heath to take me over to the shop to get my order of liquor packed or delivered. The shop is used for experimental and repair work on power sewing machines. In the rear of the shop there is a room partitioned off and about the size of large sized butcher's ice box, in which intoxicating liquor was stored and kept under lock and key. The shop is maintained by one Tony, whose last name I do not know, a man about forty-five years of age, weighing about 150 pounds, about 5 feet 8 inches tall and of German, Norwegian or Swedish extraction. On one of my several visits when George Heath took me over to these premises and opened the door to the rear room, I was given a drink from a bottle of Gilbey's Gin, which George Heath told me was for Tony's use. I have seen as many as twenty-five cases of various kinds of intoxicating liquors in that rear room. The liquor I was given to drink by Heath was gin. I also saw several broken bottles and from the smell of the contents, I know that the liquids therein contained were intoxicating liquors. When I went over to these premises, I sometimes helped George Heath pack up my order and he would then help me out into the street with it and sometimes Heath helped me put it into a taxi.

[fol. 38] On the occasions when I went up to the 200 Fifth Avenue office I usually gave my orders for intoxicating liquors to William Bartels or Philip D. Gowen. Sometimes during the noon hour, these men were out and then I would give my orders to George Heath. On one occasion at least I gave an order for Rye Whiskey to Roy Gardiner. Pay-

ments for the intoxicating liquor were usually made by me to Philip D. Gowen, in cash. He instructed me not to take checks or to give him checks because as he put it "checks" send men to Atlanta".

During my visits to the Go-Bart Importing Co., I have seen Roy Gardiner in the premises about ten or a dozen times. We usually discussed matters with Bartels and Gowen. I recollect that sometime in August or September of 1928, I had a conversation in the 200 Fifth Avenue premises with Gardiner about liquor and I told him he did not know good liquor. He told me he had formerly been a Deputy Collector of Internal Revenue and that he had been in the game longer than I had been. He told me that he had supervised rum running in Rum Row during the early days of Prohibtion and told how he used to meet the captains and liquor brokers in the Hotel McAlpin and how he had acted as pay-off man. He then proceeded to give me advice on how to work in the liquor racket. He told me a good way to work was to give my customers self addressed envelopes in a fictitious name addressed in care of the Go-Bart Importing Co., Inc., and that they would hold my mail until I came in. Then I could open the envelope and get my checks and they would see that the bank downstairs in the [fol. 39] building would cash them. He told me he himself used the name of "Charles Cramer" and had his name so addressed on the envelopes of his customers and that he put it through the bank downstairs. Gardiner also told me that as part of his present activity, he located liquor that was available for purchase and that he informed Gowen or Bartels about such liquors.

During the month of September, 1928, I recollect Gardiner and Gowen looking over a liquor trade journal from abroad, which journal contained price lists, and announcements of auction sales of liquor. I heard Gowen say there was a good liquor buy and Gardiner replied "We'll have to get (naming someone whose name I do not recollect at this time) to buy it up".

On another occasion during the same month I went up to the Go-Bart Importing Co., Inc., to give a large order for intoxicating liquor. I spoke to Gowen and asked about some rye whiskey. We were interrupted by a phone call for Gowen. Gowen turned to Roy Gardiner who was present at

the time and told Gardiner to tell me about the rye. Roy Gardiner then told me that he could get me some 1913 Overholt Rye Whiskey at about $160.00 a case and that he could furnish me with about five cases a week. Although I was ordering eleven cases of assorted liquors, I told him I could and would take one case of rye whiskey. I later received this case of rye whiskey in the shipment of the order which I gave to Philip D. Gowen.

After I had given the complete order, Philip D. Gowen told me to meet George Heath and make the arrangements for delivery with him. I spoke to George Heath and he gave me a slip of paper bearing the address Avenue P and [fol. 40] 13th Street, Brooklyn, New York, and a telephone number Sloeum 3610, which is the listed telephone number of William Bartels. Heath told me to meet him at the address and if he was delayed or for any reason he did not get there within a reasonable time, I should call the phone number I had on the slip of paper for further instructions. I drove over the place mentioned and later met George Heath, who drove up in an Oakland Coupe. I left my car and went into his car and we drove over to some private residence located on East 13th Street between Avenue O and Avenue P, Brooklyn, New York. We backed into the alleyway and went into the cellar of the premises. George Heath immediately went to several parts of the cellar and manipulated something. I asked him what he was fooling around with and he said he was "tripping" the burglar alarms because he had been down there one night and forgot to do it, and as a result, Phil Gowen and a cop had come running over to the place.

The Oakland Coupe which George Heath drove up to the premises contained part of my eleven case order and we loaded the rest of the order from the cellar of this private residence. I saw some of the shipment and order in a compartment in the rear of the car. The rear part of the car had been cut out and a new bottom of sheet metal put in. I told him I did not think the rear of the car would hold my order. He told me that eighteen cases would fit inside of it. After picking up the load, we went to premises at Fifth Avenue near 10th Street, City, County, State and Southern District of New York, where we delivered the entire order. [fol. 41] Later in the same day, I paid for my order in cash by paying William Bartels.

On or about the month of April or May, 1927, during my early visits to the Go-Bart Importing Co., Inc., I remarked to Gowen that he kept books very well. He then told me that piror to Prohibition he had been connected with the wholesale house for the Pommery Champagne people and that when they gave up business with the advent of Prohibition he and William Bartels got together and organized and formed the Go-Bart Importing Co., Inc., and took over the former customers of the champagne concern. He said they had been operating since that time. William Bartels who was present at this time said he had been a credit man for some liquor outfits.

On two occasions at least, I saw a man who I now recognize from pictures published in the newspapers as the Count de Polignac in the premises of the Go-Bart Importing Co., Inc. On these occasions he spoke to William Bartels and Philip D. Gowen but I could not hear their conversation. I have heard Bartels and Gowen in conversation refer to the "Count" but I do not know whether it is the same man that I saw in the premises.

In June, 1928, Gowen, Bartels and Gardiner discussed with me the rates of duties on the importation of the lowest grade of earthenware from Europe. They approached me because they knew I had a knowledge of customs matters. I looked it up and gave them the rates. They then told me they were going to import low grade eathenware which they would later throw away. They said they would import liquor and would throw the earthenware away after taking out the liquor hidden in them. They also inquired how [fol. 42] merchandise was selected for the public stores. I told them it was a great risk all around because there might be breakage and leakage and the scheme would be uncovered. I also told them it would be impossible to fool everyone along the line. They said they would take care of that.

During the course of my visits at the premises of the Go-Bart Importing Co., Inc., I have seen "Judge" Flynn on the premises about ten times, especially during the noon hour. I heard him most often referred to as "Judge" although on a few occasions he was called Flynn. In July 1928, on two or three occasions, Gowen and Bartels wrapped up a bottle or two of liquor for him. Once I heard him ask George Heath about a delivery of liquor to the

Metropolitan Club, stating that "Hilt" was quite anxious because he had a party on that night. George Heath said that he would get the delivery there in time. On another occasion, Judge Flynn told me that the only way to make money in the liquor racket was to do it on a large scale like Phil Gowen was doing it.

On or about April 15th, 1929, I went down to the Sub-Treasury Building, in the City, County, State and Southern District of New York, and went in Room No. 1 and met William J. Calhoun, Special Agent in Charge of Special Agents of the Bureau of Prohibition and outlined and recited to him these same facts and subject matter herein contained.

Ernest S. Braidwood.

Sworn to before me this 24th day of October, 1929.
Garrett W. Cotter, U. S. Commissioner, Southern District of New York. (Seal.)

[fol. 43] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF WILLIAM J. CALHOUN IN OPPOSITION TO ORDER TO SHOW CAUSE

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

William J. Calhoun, being duly sworn, deposes and says:

That he is the Federal Prohibition Administrator for the Administrative District of New Jersey and is an officer and employee of the Treasury Department of the United States.

That for some two years prior to June 6, 1929, he was the Special Agent in Charge of Special Agents of the Bureau of Prohibition of the Treasury Department of the United States assigned to New York City.

That he was and is in charge of the investigation of the case of United States v. Go-Bart Importing Company, Inc., Philip Gowen, William Bartels, and others.

That he has read the affidavit of Ernest S. Braidwood attached hereto and is familiar with its contents. That

prior to June 6, 1929, the said Ernest Braidwood had per-
[fol. 44] sonally related to deponent all of the facts set forth in the attached affidavit save the exact street address given in the affidavit as 26 East 22nd Street, New York City, and had in addition to these oral reports made written statements for deponent setting forth the same facts. That deponent had made and caused to be made independent investigations which corroborated in every particular the facts set forth in the attached affidavit of Ernest Braidwood and related by Ernest Braidwood to deponent prior to June 6, 1929.

The sources of these independent investigations being official investigations conducted by deponent cannot here be disclosed consistently with public justice.

That prior to June 6, 1929, deponent had further related the facts set forth in the attached affidavit of Ernest Braidwood to his subordinate officer Eugene O'Brien, who is also an officer and employee of the Bureau of Prohibition of the Treasury Department of the United States of America.

That from the aforesaid statements of Ernest Braidwood and from the independent and corroborative investigations made and caused to be made by deponent, deponent knew that a conspiracy and agreement between more than two persons to violate the laws of the United States by unlawfully and without permit importing, transporting, selling, delivering, and otherwise dealing in whiskies and other intoxicating liquors containing more than one-half of one percentum of alcohol by volume and fit and intended for use for beverage purposes, had theretofore in 1928 and 1929 been entered into and overt acts performed in furtherance thereof within the Southern District of New York, [fol. 45] and verily believed and now believe that the aforementioned Philip Gowen, William Bartels and the Go-Bart Importing Company, Inc., and each of them, had knowingly been a party to and joined in the aforementioned agreement and conspiracy and had participated in the commission of the aforesaid felony. That deponent communicated this belief together with the statement of all the facts previous mentioned herein and in the attached affidavit of Ernest Braidwood to the said Eugene O'Brien before the 6th day of June, 1929, and assigned the said Eugene O'Brien

to the further investigation of the criminal case of the Go-Bart Importing Co., Inc., et al.

William J. Calhoun.

Sworn to before me this 25th day of October, 1929. Augustus L. Friedmann, United States Commissioner. (Seal.)

[fol. 46] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF EUGENE R. O'BRIEN IN OPPOSITION TO ORDER TO SHOW CAUSE

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Eugene R. O'Brien, being duly sworn, deposes and says: That he is a duly appointed and commissioned agent and employee of the Commissioner of Prohibition of the Bureau of Prohibition and an officer of the Treasury Department of the United States of America, charged with the duties of enforcing the laws of the United States pertaining to narcotics and intoxicating liquors. That he has been such an officer continuously for a period of approximately two years heretofore.

That he has read the affidavit of Ernest S. Braidwood, attached hereto, and is familiar with its contents. That he has also read the affidavit of William J. Calhoun, attached hereto, and is familiar with its contents. That prior to June 6, 1929, the said William J. Calhoun personally related to deponent the facts set forth in the attached affidavit of Ernest S. Braidwood save the exact street address [fol. 47] given in the affidavit as 26 East 22nd Street, New York City. The said facts set forth in the attached affidavit of Ernest S. Braidwood are, exclusive of the address 26 East 22nd Street, New York City, specifically included herein by reference, with the same effect as though here set forth at length. That the said William J. Calhoun, who was the superior officer of deponent on and prior to June 6, 1929, further stated to deponent that he had made an

independent investigation of the facts set forth in the attached affidavit of Ernest S. Braidwood and that the result of his investigation was to corroborate and to confirm the facts related to him by Braidwood. That the said William J. Calhoun prior to June 6, 1929, had furthermore described in detail to deponent the offices occupied by the Go-Bart Importing Company, Inc., Philip Gowen and William Bartels, and had furthermore described to deponent the personal appearance of both Gowen and Bartels. That the said William J. Calhoun had furthermore informed deponent that the Go-Bart Importing Company, Inc., Philip Gowen and William Bartels, together with others, had theretofore committed the crime of conspiring to violate the laws of the United States by the unlawful importation, sale and delivery of intoxicating liquors for beverage purposes. That from the aforesaid statements of William J. Calhoun, deponent was of the belief before June 6, 1929, that the Go-Bart Importing Company, Inc., Philip Gowen, William Bartels, and a number of other individuals, had in fact committed the felony of conspiring to violate the laws of the United States pertaining to intoxicating liquors.

[fol. 48] That on June 6, 1929, deponent furthermore saw a formal complaint filed with the United States Commissioner for the Southern District of New York and signed by William J. Calhoun, with whose signature deponent is familiar, charging the above-named individuals together with a large number of others, with the crime of conspiring to violate the laws of the United States. Deponent took a certified copy of the said complaint to which was attached a certified copy of a warrant of arrest issued for all defendants in the said complaint for the purpose of reference as to the names of the various defendants.

That thereafter and on June 6, 1929, deponent, in company with two other brother officers, went to premises known as 200 Fifth Avenue, in the City, State and Southern District of New York, and there proceeded to suite 1030. Deponent entered the said suite which consisted of three rooms occupied as offices and fitted up with regular office furniture including chairs, desks, file cabinets and a safe. In the said premises deponent found the defendant William Bartels and shortly thereafter the defendant Philip Gowen.

Deponent stated to them that he was an officer of the United States and placed them under arrest for the commission of the felony hereinbefore described. That the arrests of the aforementioned defendants Philip Gowen and William Bartels were in each instance made by deponent upon the ground and for the reason that a conspiracy and agreement between more than two persons to violate the laws of the United States by unlawfully and without permit importing, transporting, selling, delivering and otherwise dealing [fol. 49] in whiskies and other intoxicating liquors containing more than one-half of one per cent. of alcohol by volume and fit and intended for use for beverage purposes had theretofore in 1928 and 1929 been entered into, and overt acts performed in furtherance thereof, within the Southern District of New York, and before the said arrests I was in possession of detailed information given to me by my superior officer William J. Calhoun which I then believed and now believe to be credible and reasonable that the aforementioned defendants Philip Gowen and William Bartels and each of them, had knowingly been a party to and joined in the aforementioned agreement and conspiracy and had participated in the commission of the aforesaid felony.

That at no time did deponent serve or attempt to serve or execute any warrant of arrest or search warrant upon the said Philip Gowen or William Bartels, nor did either of the officers accompanying deponent do so. That deponent never made any return or any purported return upon any warrant or paper of any sort purporting to be a warrant of arrest or search in connection with his apprehension of the above mentioned Philip Gowen and William Bartels.

That after the arrests of Philip Gowen and William Bartels, as aforesaid, their persons were searched and various papers taken therefrom. That thereupon a search was made of the suite of rooms in which Philip Gowen and William Bartels were arrested and as a result of this search, there were found approximately a dozen bottles of assorted intoxicating liquors. That a further search of the said suite of rooms in which the said defendants were arrested was made and a large number of memoranda, books of account,

[fol. 50] records, filing cases and other papers were found, all of which pertained on the face thereof to unlawful dealings by the said Gowen and Bartels in intoxicating liquors. These papers included index lists with names and addresses of customers together with amounts outstanding as payable for liquors; detailed inventories of liquors on hand, received, sold and delivered; detailed records of deliveries of intoxicating liquors to persons within the Southern District of New York and elsewhere; individual receipts for liquor deliveries signed by such customers; ledger accounts setting forth exact purchases of liquors made by particular customers, amounts due thereon, and amounts paid thereon; and letters and other correspondence having to do with the purchase, sale and delivery of intoxicating liquors.

That the said papers, memoranda, books, records and accounts so seized in the said premises by deponent are of such quantity and bulk that it is impractical to attach hereto copies thereof. That the said papers, memoranda, books, records and accounts so seized in the said premises by deponent, and now in the possession of Special Agents of the Treasury Department of the United States at the Sub-Treasury Building in New York City, are, however, specifically incorporated herein by reference and made a part hereof and are further made available for inspection at any time, if desired by the Court, in connection with the consideration of this order to show cause.

Eugene R. O'Brien.

Sworn to before me this 24th day of October, 1929.
Garrett W. Cotter, U. S. Commissioner, Southern District of New York. (Seal.)

[fol. 51] In United States District Court

Replying Affidavit of Philip D. Gowen in Support of Order to Show Cause

State of New York,
City of New York,
County of New York, ss:

Philip D. Gowen being duly sworn, deposes and says: That he is a defendant in this action.

That he has read the affidavits of Eugene R. O'Brien, verified the 24th day of October, 1929; of Ernest Braidwood, verified the 24th day of October, 1929, and of William J. Calhoun, verified the 25th day of October, 1929, in opposition to this motion.

That on the 6th day of June, 1929, he was arrested at premises 200 Fifth Avenue, suite 1030, by Eugene R. O'Brien, Special Agent of the Bureau of Prohibition, Treasury Department of the United States.

Your deponent walked into suite 1030 at about 10:30 A. M. and was accosted by said O'Brien. O'Brien said to your deponent, "What's your name"? Your deponent answered "Gowen", and then O'Brien pulled from his inner coat pocket a paper, and told your deponent that he was under arrest, and that he had a warrant, and that the paper was the warrant. Your deponent then asked said O'Brien [fol. 52] to permit your deponent to read the paper. O'Brien handed the paper to your deponent and your deponent read the paper and said to O'Brien, "This is not a search warrant. This is a warrant of arrest". Your deponent asked O'Brien for a duplicate and O'Brien said he did not have one, and that he would probably get one when he went downtown.

A while later, several other persons entered the premises and were also placed under arrest. At that time your deponent again read the said paper, which O'Brien had in his possession. Your deponent has not been able to secure a copy of this paper, but he believes that the said paper or papers constituted a warrant for his arrest, and an affidavit or complaint made out by one William J. Calhoun and sworn to by said Calhoun, and he believes that said papers are the same as those annexed to the motion papers filed on behalf of your deponent by his attorney, J. Edward Lumbard, Jr., as Exhibits A and B.

On the reverse or cover of said papers, there was the word "Warrant".

Philip D. Gowen.

Sworn to before me this 30th day of October, 1929.
Seymour B. Quel, Notary Public, N. Y. Co. No. 5, Reg. No. 1Q12. Certificate filed in Westchester Co. Commission expires March 30th, 1931. (Seal.)

[fol. 53] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLYING AFFIDAVIT OF WILLIAM BARTELS IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK,
City of New York,
County of New York, ss:

William Bartels, being duly sworn, deposes and says:

That he is a defendant in this action. That he has read the affidavits of Eugene R. O'Brien, verified the 24th day of October, 1929, of Ernest Braidwood, verified the 24th day of October, 1929, and of William J. Calhoun, verified the 25th day of October, 1929, in opposition to this motion.

That on the 6th day of June, 1929, he was arrested at premises 200 Fifth Avenue, suite 1030 by Eugene R. O'Brien, Special Agent of the Bureau of Prohibition, Treasury Department of the United States.

Your deponent was in said premises when said O'Brien walked in. O'Brien asked your deponent his name. Your deponent told him his name, and then O'Brien took from his coat pocket a paper and told your deponent that he was [fol. 54] under arrest, and that he had a warrant and that the paper was a warrant. Your deponent then asked said O'Brien to permit your deponent to read the paper. O'Brien handed the paper to your deponent, and your deponent read it and said to O'Brien, "This is not a search warrant; this is a warrant of arrest". Your deponent asked O'Brien for a duplicate and O'Brien said that he would probably get one when he went downtown.

A while later several other persons entered the premises and were also placed under arrest, and at that time your deponent again read the said paper which O'Brien had in his possession. Your deponent has not been able to secure a copy of this paper, but he believes that the said paper or papers constituted a warrant for his arrest, and an affidavit or complaint made out by one William J. Calhoun and sworn to by said Calhoun, and he believes that said papers are the same as those annexed to the motion papers filed on behalf of your deponent by his attorney, J. Edward Lumbard, Jr., as Exhibits A and B.

On the reverse or cover of said papers, there appeared the word, "Warrant".

William Bartels.

Sworn to before me this 30th day of October, 1929. Seymour B. Quel, Notary Public, N. Y. Co., No. 5, Reg. No. 1Q12. Certificate filed in Westchester Co. Commission expires March 30th, 1931. (Seal.)

[fol. 55] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLYING AFFIDAVIT OF RAY GARDNER IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Ray Gardner, being duly sworn, deposes and says, that he is one of the defendants in this action.

That he has read the affidavits of Eugene R. O'Brien, verified the 24th day of October, 1929, of Ernest Braidwood, verified the 24th day of October, 1929, and of William J. Calhoun, verified the 25th day of October, 1929, in opposition to this motion.

That on the 6th day of June, 1929, he was arrested at premises 200 Fifth Avenue, suite 1030 by Eugene O'Brien, Special Agent of the Bureau of Prohibition, Treasury Department, of the United States.

Your deponent walked into suite 1030 at about 11:55 A. M. and was accosted by said O'Brien. O'Brien said to your deponent, "What's your name?" Your deponent [fol. 56] answered, "Ray Gardner", and then O'Brien indicated a paper on a desk at which he was seated, and told your deponent that he was under arrest, and that he had a warrant. Your deponent believes the paper indicated was the warrant. When your deponent was in the premises, others of the defendants arrested at the premises were reading over a set of papers which your deponent understood had been turned over to them by the said O'Brien.

Your deponent has not secured a copy of these papers but he believes that the said papers constituted a warrant for his arrest, and an affidavit or complaint made out by one William J. Calhoun and sworn to by said Calhoun, and he believes that said papers are the same as those annexed to the motion papers filed on behalf of your deponent by his attorney, J. Edward Lumbard, Jr., as Exhibits A and B.

Ray Gardner.

Sworn to before me this 30th day of October, 1929. Seymour B. Quel, Notary Public, N. Y. Co. No. 5, Reg. No. 1Q12. Certificate filed in Westchester Co. Commission expires March 30th, 1931. (Seal.)

[fol. 57] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLYING AFFIDAVIT OF GEORGE HEATH IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK,
City of New York,
County of New York, ss:

George Heath being duly sworn, deposes and says:

That he is a defendant in this action. That he has read the affidavits of Eugene R. O'Brien, verified the 24th day of October, 1929, of Ernest Braidwood, verified the 24th day of October, 1929, and of William J. Calhoun, verified the 25th day of October, 1929, in opposition to this motion.

That on the 6th day of June, 1929, he was arrested at premises 200 Fifth Avenue, suite 1030, by Eugene R. O'Brien, Special Agent of the Bureau of Prohibition, Treasury Department of the United States.

That your deponent was in said premises when said O'Brien walked in and asked your deponent what his name was. Your deponent gave his name and said O'Brien took [fol. 58] a paper from his coat pocket and said, "This is a warrant for your arrest." He handed some papers to your deponent, which papers consisted of about four sheets attached together. Your deponent read said papers. One

of said papers was a warrant for the arrest of your deponent and for other persons, and among the papers there was also a complaint made out by William J. Calhoun. Your deponent believes that said papers are the same as Exhibits A and B attached to the motion papers herein.

Said O'Brien was in the premises from about ten o'clock in the morning until two o'clock in the afternoon, and during this time he exhibited said papers to various persons in the premises and to those whom he placed under arrest, including Philip D. Gowen, William Bartels, William B. Flynn, William Howard, Ray Gardner, Robert McCauley and a Mr. McNesbit.

Your deponent was placed under arrest by the said O'Brien.

George Heath.

Sworn to before me this 30th day of October, 1929. Seymour B. Quel, Notary Public, N. Y. Co. No. 5, Reg. No. 1Q12. Certificate filed in Westchester Co. Commission expires March 30th, 1931. (Seal.)

[fol. 59] In United States District Court

[Title omitted]

Replying Affidavit of William B. Flynn in Support of Order to Show Cause

State of New York,
City of New York,
County of New York, ss:

William B. Flynn being duly sworn, deposes and says, that he is a defendant in this action.

That he has read the affidavits of Eugene R. O'Brien, verified the 24th day of October, 1929, of Ernest Braidwood, verified the 24th day of October, 1929, and of William J. Calhoun, verified the 25th day of October, 1929, in opposition to this motion.

That on the 6th day of June, 1929, he was arrested at premises 200 Fifth Avenue, suite 1030 by Eugene R.

O'Brien, Special Agent of the Bureau of Prohibition, Treasury Department of the United States.

That when your deponent entered said premises the said O'Brien accosted your deponent and asked him his business and his name. Your deponent stated that he was in the premises on business, and that his name was William B. Flynn.

Thereupon said O'Brien placed your deponent under arrest.

[fol. 60] Upon your deponent being placed under arrest, your deponent inquired of the said O'Brien his authority for the arrest. O'Brien told your deponent that the premises were under arrest, and that your deponent would have to stay. Neither O'Brien nor any one of the other two government agents in the premises, exhibited any warrant or paper to your deponent. However, when your deponent was in the premises others of the defendants arrested at the premises were reading over a set of papers which your deponent understood had been turned over to them by the said O'Brien. Your deponent read over part of said papers. One of the papers was a warrant for the arrest of various persons and included the name of "George Flynn, alias 'The Judge'" and the names of other persons arrested at premises 200 Fifth Avenue. Your deponent believes that said name of "George Flynn" referred to your deponent.

Your deponent was informed and verily believes that he was arrested under and by virtue of said warrant of arrest. Your deponent did not fully read over the said papers to any extent, but he believes the said papers were the same as Exhibits A and B annexed to the motion papers herein.

William B. Flynn.

Sworn to before me this 30th day of July, 1929. Seymour B. Quel, Notary Public, N. Y. Co. No. 5, Reg. No. 1Q12. Certificate filed in Westchester Co. Commission expires March 30th, 1931. (Seal.)

[fol. 61] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLYING AFFIDAVIT OF ROBERT MCCAULEY IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Robert McCauley, being duly sworn deposes and says, that he is one of the defendants in this action.

That he has read the affidavits of Eugene R. O'Brien, verified the 24th day of October, 1929, of Ernest Braidwood, verified the 24th day of October, 1929, and of William J. Calhoun, verified the 25th day of October, 1929, in opposition to this action.

That on the 6th day of June, 1929, he was arrested at premises 200 Fifth Avenue, suite 1030 by Eugene R. O'Brien, Special Agent of the Bureau of Prohibition, Treasury Department of the United States.

Your deponent walked into suite 1030 at about 11:00 o'clock A. M. and was accosted by said O'Brien. O'Brien [fol. 62] asked your deponent what his name was and your deponent answered, "Robert McCauley". After O'Brien was told your deponent's name, he stated that deponent was under arrest and that he couldn't leave the premises. When your deponent was in the premises, others of the defendants who were arrested there were reading over a set of papers, and your deponent also read the said set of papers. Your deponent believes that said papers were a warrant for his arrest, and an affidavit or complaint made out by said William J. Calhoun and sworn to by said Calhoun, and he believes the said papers are the same as those annexed to the motion papers filed on behalf of your deponent by his attorney, J. Edward Lumbard, Jr., as Exhibits A and B.

Robert McCauley.

Sworn to before me this 30th day of October, 1929. Seymour B. Quel, Notary Public, N. Y. Co. No. 5, Reg. No. 1Q12. Certificate filed in Westchester Co. Commission expires March 30th, 1931. (Seal.)

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLYING AFFIDAVIT OF WILLIAM HOWARD IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK,
City of New York,
County of New York, ss:

William Howard, being duly sworn, deposes and says:

That he was formerly a defendant in this action.

That he has read the affidavits of Eugene R. O'Brien, verified the 24th day of October, 1929, of Ernest Braidwood, verified the 24th day of October, 1929, and of William J. Calhoun, verified the 25th day of October, 1929, in opposition to this motion, and also the affidavit of Philip D. Gowen, verified the 30th day of October, 1929, in support of this motion.

That on the 6th day of June, 1929, he was arrested at premises 200 Fifth Avenue, New York City, Suite 1030, by Eugene R. O'Brien, Special Agent of the Bureau of Prohibition, Treasury Department of the United States of America.

Your deponent walked into suite 1030, 200 Fifth Avenue, at about 12:30 P. M. on said 6th day of June, 1929, and was [fol. 64] accosted by O'Brien and other Prohibition Agents. Agent O'Brien asked your deponent what his name was and *and* what business he came there on. Your deponent replied and said he was there to see Mr. Bartels about some insurance. He then informed your deponent that he was a Federal Agent, that the place was "pinched" and that your deponent was under arrest. Said O'Brien then searched your deponent.

Your deponent asked agent O'Brien what he was arrested for. Agent O'Brien told him he was arrested for conspiracy.

Your deponent then saw Mr. Gowen holding a paper in his hands reading off some names. Your deponent asked him what it was and he said a warrant. Your deponent further asked him if his, your deponent's, name was on it and Mr. Gowen told him that it was not.

That subsequent to the foregoing occurrence, your deponent was arraigned before the United States Commissioner for the Southern District of New York, charged with a conspiracy to violate the National Prohibition Act. Subsequently, your deponent was discharged from custody, the complaint against your deponent dismissed and your deponent is, therefore, no longer a defendant in this action.

William Howard.

Sworn to before me this 31st day of October, 1929. J. Cassin Healy, Notary Public, Westchester Co., N. Y. Co. Clks. No. 593, Reg. No. 1H415. Commission expires March 30, 1931. (Seal.)

[fol. 65] In United States District Court

[Title omitted]

Replying Affidavit of John R. MacNesbitt in Support of Order to Show Cause

State of New York,
City of New York,
County of New York, ss:

John R. MacNesbitt, being duly sworn, deposes and says that he was formerly a defendant in this action.

That he has read the affidavit of Eugene R. O'Brien, verified the 24th day of October, 1929, the affidavit of Ernest Braidwood, verified the 24th day of October, 1929, and the affidavit of William J. Calhoun, verified the 25th day of October, 1929, in opposition to this motion, and also the affidavit of Philip D. Gowen, verified the 30th day of October, 1929, in support of this motion.

That on the 6th day of June, 1929, he was arrested at premises 200 Fifth Avenue, New York City, suite 1030, by Eugene R. O'Brien, Special Agent of the Bureau of Prohibition, Treasury Department of the United States.

Your deponent walked into suite 1030 at about 10:45 A. M. on said day and was accosted by O'Brien and the [fol. 66] other prohibition agents. One of the other agents, whose name deponent does not know, informed your depo-

nent that he was under arrest. After this statement was made to your deponent, a paper was exhibited to your deponent by Philip D. Gowen, one of the defendants herein, which paper the said Gowen stated had been handed to him by the Prohibition Agents. Your deponent read this paper and saw that it was a warrant for the arrest of the said Philip D. Gowen and for certain other persons whose names your deponent cannot recall with exactness. That your deponent is informed and believes that the said warrant is the warrant referred to in the affidavit of Philip D. Gowen verified the 30th day of October, 1929, and submitted in support of this motion.

That subsequent to these conversations, your deponent was arrested and arraigned before the United States Commissioner for the Southern District of New York charged with a conspiracy to violate the National Prohibtion Act. That subsequently your deponent was discharged from custody and the complaint against your deponent dismissed, and your deponent is, therefore, no longer a defendant in this action.

John R. MacNesbitt.

Sworn to before me this 30th day of October, 1929. Seymour B. Quel, Notary Public, N. Y. Co. No. 5, Reg. No. 1Q12. Certificate filed in Westchester Co. Commission expires March 30th, 1931. (Seal.)

[fol. 67] In United States District Court

[Title omitted]

Replying Affidavit of John B. Hobby in Support of Order to Show Cause

State of New York,
City of New York,
County of New York, ss:

John B. Hobby, being duly sworn, deposes and says: That he was formerly a defendant in this action.

That on the 5th day of June, 1929, your deponent was arrested at premises No. 24 West Street, Borough of Man-

hattan, City of New York by three Special Agents of the Bureau of Prohibition, Treasury Department of the United States. That the name of one of the said agents, your deponent believes to be Arnold. That your deponent does not know the names of the other two Special Agents.

That the circumstances surrounding your deponent's arrest were as follows:

Your deponent was on the said premises No. 24 West Street, Borough of Manhattan, New York City, where your deponent is engaged in the warehouse business as an officer [fol. 68] of John B. Hobby Sons Co., on the 5th day of June, 1929, at about 10 o'clock A. M., when the said Arnold and the other two agents came into the premises. Your deponent was not on the ground floor of the said premises when the said agents came in, but was on one of the upper stories of the building. Upon being informed of the arrival of the said agents, your deponent went down to the ground floor of the premises. Upon reaching the ground floor of the premises, your deponent was accosted by Agent Arnold who, after inquiring as to your deponent's name, informed deponent that he had a warrant for your deponent's arrest and drew from his pocket a paper which he exhibited to your deponent as the said warrant.

That subsequent to these occurrences, your deponent was arrested and arraigned before the United States Commissioner for the Southern District of New York, charged with conspiracy to violate the National Prohibtion Act, and released on $2,500 bail. That subsequently the proceedings against your deponent were dropped and the charges against your deponent were dismissed.

John B. Hobby.

Sworn to before me this 31st day of October, 1929. Seymour B. Quel, Notary Public. N. Y. Co. 5, Reg. No. 1Q12. Certificate filed in Westchester Co. Commission expires March 30th, 1931. (Seal.)

[fol. 69] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLYING AFFIDAVIT OF MILFRED A. GANTS IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Milfred A. Gants, being duly sworn, deposes and says:

That he is a defendant in this action, being named herein as "Max A. Gants".

That he has read the affidavit of Eugene R. O'Brien, verified the 24th day of October, 1929, and the affidavit of William J. Calhoun, verified the 25th day of October, 1929, in opposition to this motion.

That on the 6th day of June, 1929, your deponent was arrested at premises 3 East 28th Street, Borough of Manhattan, City of New York, by two Special Agents of the Bureau of Prohibition, Treasury Department of the United States, whose names your deponent believes to be Smith and Mullen.

The circumstances surrounding your deponent's arrest were as follows:

Your deponent was on the said premises No. 3 East 28th Street, New York City, where your deponent is engaged in the lamp importing business on the 6th day of June, [fol. 70] 1929, at about 10:00 A. M., when the said Smith and Mullen came into the said premises, accosted your deponent and, after inquiring as to you- deponent's name, informed your deponent that they had a warrant for his arrest, and thereupon the said Smith took from his pocket a paper which he exhibited to your deponent and told your deponent was the warrant for the arrest of your deponent. Your deponent asked that he be permitted to read the paper. Smith refused to let your deponent read the paper and thereupon the two agents proceeded to search the person of your deponent as well as the said premises. After the search of your deponent's person and the said premises had continued for about an hour, your deponent again de-

manded of the said Smith that he be permitted to read the alleged warrant. Smith again refused and when asked for a reason for his refusal, stated that he did not wish your deponent to read the said warrant because it contained the names of other persons and he did not wish your deponent to communicate with these other persons.

Your deponent has read the affidavit of Philip D. Gowen, verified the 30th day of October, 1929, submitted in support of this motion and your deponent verily believes that the paper exhibited to him by the said Smith was a warrant issued in this action for the arrest of your deponent and for the arrest of the other defendants herein.

Milfred A. Gants.

Sworn to before me this 31st day of October, 1929. Seymour B. Quel, Notary Public. N. Y. Co. 5, Reg. No. 1Q12. Certificate filed in Westchester Co. Commission expires March 30th, 1931. (Seal.)

[fol. 71] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLYING AFFIDAVIT OF GERTRUDE INTEMANN IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Gertrude Intemann, being duly sworn, deposes and says:

That she is the widow of Christian Intemann who was a defendant in this action. That on the 6th day of June, 1929, she was present when the said Christian Intemann was arrested on the premises at 152 West 17th Street, Borough of Manhattan, City of New York by E. F. Murphy, Special Agent of the Bureau of Prohibition, Treasury Department of the United States.

That the said arrest occurred about 10 A. M. on the said 6th day of June, 1929, when the said E. F. Murphy and

two other men entered the said premises at 152 West 17th Street.

That in the presence of your deponent, the said Murphy asked the said Christian Intemann his name, whereupon the [fol. 72] said Christian Intemann gave his name and Murphy thereupon told him that he was under arrest. Said Christian Intemann demanded to know by what authority he was placed under arrest and Murphy told him that he had a warrant for his arrest. Thereupon and in the presence of your deponent, Murphy drew from his pocket some papers which he showed to said Christian Intemann without permitting him to read the same and said to the said Christian Intemann that the papers were a warrant for his arrest.

The said Murphy told the said Christian Intemann in the presence of your deponent that he had a warrant to search the premises but he did not permit the said Christian Intemann or your deponent to read any of the said papers and he did not leave a copy of any papers with either the said Christian Intemann or your deponent.

Gertrude Intemann.

Sworn to before me this 30th day of October, 1929. Seymour B. Quel, Notary Public. N. Y. Co. 5, Reg. No. 1Q12. Certificate filed in Westchester Co. Commission expires March 30th, 1931. (Seal.)

[fol. 73] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLYING AFFIDAVIT OF ROBERT NELSON IN SUPPORT OF ORDER TO SHOW CAUSE.

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Robert Nelson, being duly sworn, deposes and says:

That he was formerly one of the defendants in this action.

That on the 6th day of June, 1929, he was arrested at premises 2123 Vorhies Avenue, Borough of Brooklyn, City of New York.

That the arrest of your deponent occurred under the following circumstances:

That your deponent was on the said premises 2123 Vorhies Avenue, which is a private dwelling house where your deponent resides, on the said 6th day of June, 1929, when two Special Agents of the Bureau of Prohibition, Treasury Department of the United States of America, whose names your deponent believes to be Porter and Dunne, entered the [fol. 74] said premises. The said Agent Dunne informed your deponent that he had a warrant for the arrest of your deponent and also a search warrant to search the premises. That the said Agent Dunne exhibited to your deponent a paper which he said was the warrant for your deponent's arrest and your deponent read said paper and saw thereon the word "Warrant". That subsequent to these incidents, your deponent was arrested and arraigned before the United States Commissioner for the Southern District of New York, and that subsequently, the proceedings against your deponent were dismissed and the charges against your deponent were dropped.

Robert C. Nelson.

Sworn to before me this 31st day of October, 1929. L. G. Gerardin, Notary Public, Kings County, N. Y., No. 370. Certificate filed in Kings County, N. Y., Reg. No. 559. Commission expires March 30, 1930. (Seal.)

[fol. 75] In United States District Court

[Title omitted]

Replying Affidavit of Joseph M. Dooley in Support of Order to Show Cause

State of New York,
City of New York,
County of New York, ss:

Joseph M. Dooley, being duly sworn, deposes and says: That he is a defendant in this action.

That he has read the affidavits of Eugene R. O'Brien, verified the 24th day of October, 1929, of Ernest Braidwood, verified the 24th day of October, 1929, and of William J. Calhoun, verified the 25th day of October, 1929, in opposition to this motion.

That on the 6th day of June, 1929, he was arrested at premises No. 445 Twelfth Street, Borough of Brooklyn, New York City, by —— Thibedeau, Special Agent of the Bureau of Prohibition, Treasury Department of the United States.

The circumstances surrounding your deponent's arrest were as follows:

Your deponent was on the said premises at No. 445 Twelfth Street, Borough of Brooklyn, New York City, where [fol. 76] your deponent is engaged in the storage and warehouse business, on the said 6th day of June, 1929. At about 9 o'clock A. M., the said —— Thibedeau, Special Agent of the Bureau of Prohibition, Treasury Department of the United States, came into the said premises, accosted your deponent, and after inquiring as to your deponent's name, informed your deponent that he was under arrest. Thereupon your deponent said to him, "What am I under arrest for, and what is your authority for arresting me?" Thibedeau replied, "I am an officer of the Government and I have a warrant for your arrest." After making the above statement, Thibedeau took out of his pocket a paper which he showed to your deponent, and which he told your deponent was a warrant for your deponent's arrest. Your deponent then asked the said Thibedeau to permit your deponent to read the paper. The said Thibedeau refused to let your deponent read the paper, saying to your deponent that there were names on the warrant that he did not wish your deponent to see, and again informed your deponent that the said paper was a warrant for the arrest of your deponent.

Subsequent to this conversation, the said Thibedeau together with three other Agents who had entered the said premises, proceeded to search the said premises. Your deponent remonstrated with Thibedeau and protested against the search and asked Thibedeau what his authority for

searching the premises was. Thibedeau told your deponent that he had a search warrant to search the premises and intimated that he would use force if any resistance were offered. Your deponent asked to be shown the search warrant and thereupon Thibedeau waived in his hand the paper [fol. 77] which he had previously taken out and told your deponent was a warrant for the arrest of your deponent, now saying that the paper was a search warrant to search the premises. Your deponent again requested Thibedeau to permit your deponent to read the said paper, but Thibedeau refused to do so, saying to your deponent that there were names on the warrant that he did not wish your deponent to see.

Joseph M. Dooley.

Sworn to before me this 30th day of October, 1929. Seymour B. Quel, Notary Public, N. Y. Co. No. 5, Reg. No. 1Q12. Certificate filed in Westchester Co. Commission expires March 30th, 1931. (Seal.)

[fol. 78] In United States District Court

Supplemental Affidavit of Harold G. Sipe in Opposition to Order to Show Cause

State of New York,
County of New York,
Southern District of New York, ss:

Harold G. Sipe, being duly sworn, deposes and says:

That he is a duly appointed and commissioned agent and employee of the Commissioner of Prohibition of the Bureau of Prohibition and an officer of the Treasury Department of the United States of America, charged with the duties of enforcing the laws of the United States pertaining to narcotics and intoxicating liquors. That he has been such an officer continuously for a period of approximately two years heretofore.

That on June 6, 1929, deponent in company with Eugene R. O'Brien and Edward Collins, two brother officers, went

to premises known as 200 Fifth Avenue, in the City, State and Southern District of New York and there proceeded to suite 1030. Deponent in company with the other two officers entered the said suite which consisted of three rooms [fol. 79] occupied as offices and fitted up with regular office furniture, including chairs, desks, file cabinets and safes. In the said premises deponent found the defendant William Bartels and shortly thereafter the defendant Philip Gowen. Agent Eugene O'Brien stated to Bartels and Gowen that he was an officer of the United States and he placed them under arrest.

That at no time did dependent serve or attempt to serve or execute any warrant of arrest or search warrant upon the said Philip Gowen or William Bartels, nor did either officer O'Brien or Collins, who accompanied deponent do so. That deponent was present at the arrest of each of these two individuals and saw and heard what there took place. That deponent never made any return or any purported return upon any warrant or paper of any sort purporting to be a warrant of arrest or search in connection with the apprehension by officer Eugene O'Brien of the above mentioned Philip Gowen and William Bartels.

That after the arrests of Philip Gowen and William Bartels, as aforesaid, their persons were searched and various papers taken therefrom. That thereupon a search was made of the suite of rooms in which Philip Gowen and William Bartels were arrested and as a result of this search, there were found approximately a dozen bottles of assorted intoxicating liquors. That a further search of the said suite of rooms in which the said defendants were arrested was made and a large number of memoranda, books of account, records, filing cases and other papers were found, all of which pertained on the face thereof to unlawful dealings by the said Gowen and Bartels in intoxicating liquors. These papers included index lists with names and addresses of customers together with amounts [fol. 80] outstanding as payable for liquors; detailed inventories of liquors on hand, received, sold and delivered; detailed records of deliveries of intoxicating liquors to persons within the Southern District of New York and elsewhere; individual receipts for liquor deliveries signed by such customers; ledger accounts setting forth exact pur-

chases of liquors made by particular customers, amounts due thereon, and amounts paid thereon; and letters and other correspondence having to do with the purchase, sale and delivery of intoxicating liquors.

That the said papers, memoranda, books, records and accounts so seized in the said premises by Eugene O'Brien are of such quantity and bulk that it is impractical to attach hereto copies thereof. That the said papers, memoranda, books, records and accounts so seized in the said premises by Eugene O'Brien, and now in the possession of Special Agents of the Treasury Department of the United States at the Sub-Treasury Building in New York City, are, however, specifically incorporated herein by reference and made a part hereof and are further made available for inspection at any time, if desired by the Court, in connection with the consideration of this order to show cause.

H. G. Sipe.

Sworn to before me this 4th day of November, 1929. Francis A. O'Neill, U. S. Commissioner, Southern District of New York. (Seal.)

[fol. 81] IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL AFFIDAVIT OF EDWARD COLLINS IN OPPOSITION TO MOTION

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Edward Collins, being duly sworn, deposes and says:

That he is a duly appointed and commissioned agent and employee of the Commissioner of Prohibition of the Bureau of Prohibition and an officer of the Treasury Department of the United States of America, charged with the duties of enforcing the laws of the United States pertaining to narcotics and intoxicating liquors. That he has been such an officer continuously for a period of approximately two years heretofore.

That on June 6, 1929, deponent in company with Eugene R. O'Brien and Harold G. Sipe, two brother officers, went

to premises known as 200 Fifth Avenue, in the City, State and Southern District of New York and there proceeded to suite 1030. Deponent in company with the other two officers entered the said suite which consisted of three rooms occupied as offices and fitted up with regular office furniture, including chairs, desks, file cabinets and safes. In said premises deponent found the defendant William [fol. 82] Bartels and shortly thereafter the defendant Philip Gowen. Agent Eugene O'Brien stated to Bartels and Gowen that he was an officer of the United States and he placed them under arrest.

That at no time did deponent serve or attempt to serve or execute any warrant of arrest or search warrant upon the said Philip Gowen or William Bartels, nor did either Officer O'Brien nor Sipe, who accompanied deponent do so. That deponent was present at the arrest of each of these two individuals and saw and heard what there took place. That deponent never made any return or any purported return upon any warrant or paper of any sort purporting to be a warrant of arrest or search in connection with the apprehension by Officer Eugene O'Brien of the above mentioned Philip Gowen and William Bartels.

That after the arrests of Philip Gowen and William Bartels, as aforesaid, their persons were searched and various papers taken therefrom. That thereupon a search was made of the suite of rooms in which Philip Gowen and William Bartels were arrested and as a result of this search, there were found approximately a dozen bottles of assorted intoxicating liquors. That a further search of the said suite of rooms in which the said defendants were arrested was made and a large number of memoranda, books of account, records, filing cases and other papers were found, all of which pertained on the face thereof to unlawful dealings by the said Gowen and Bartels in intoxicating liquors. These papers included index lists with names and addresses of customers together with amounts outstanding as payable for liquors; detailed inventories of liquors on hand, received, sold and delivered; detailed [fol. 83] records of deliveries of intoxicating liquors to persons within the Southern District of New York and elsewhere; individual receipts for liquor deliveries signed by such customers; ledger accounts setting forth exact pur-

chases of liquors made by particular customers, amounts due thereon, and amounts paid thereon; and letters and other correspondence having to do with the purchase, sale and delivery of intoxicating liquors.

That the said papers, memoranda, books, records and accounts so seized in the said premises by Eugene O'Brien are of such quantity and bulk that it is impractical to attach hereto copies thereof. That the said papers, memoranda, books, records and accounts so seized in the said premises by Eugene O'Brien, and now in the possession of Special Agents of the Treasury Department of the United States at the Sub-Treasury Building in New York City, are, however, specifically incorporated herein by reference and made a part hereof and are further made available for inspection at any time, if desired by the Court, in connection with the consideration of this order to show cause.

Edward Collins.

Sworn to before me this 4th day of November, 1929. Garrett W. Cotter, U. S. Commissioner, Southern District of New York. (Seal.)

[fol. 84] In United States District Court

United States of America, Complainant,

against

Philip D. Gowen, William Bartels, et al., Defendants

Memoranda of Coxe, D. J., Denying Order to Show Cause

Coxe, D. J.:

This is a motion for the return of papers and documents seized by Prohibition agents on June 6, 1929, at the time of the arrest of defendants Gowen and Bartels, at the office of Go-Bart Importing Company, Inc., 200 Fifth Avenue, New York City. On June 5, 1929, a warrant for the arrest of these two defendants and numerous others, was issued by Commissioner Cotter, directed to the Marshal of this District. The warrant was based on a complaint

of Special Agent Calhoun of the Bureau of Prohibition, verified June 5, 1929, which, in general terms, charged all of the defendants with being parties to a criminal conspiracy to violate the Prohibition Act, but failed to show any facts to sustain the charge or to justify the issuance of the warrant. Certified copies of the warrant and complaint were thereupon placed in the hands of Agent O'Brien, who, on June 6, 1929, went to the office of the Go-Bart Importing Company, Inc., 200 Fifth Avenue, New [fol. 85] York City, in company with Agents Collins and Sipe, and arrested there the defendants Gowen and Bartels, the President and Secretary and Treasurer, respectively, of the Go-Bart Importing Company, Inc. The officers of the Company were thereupon searched by the three agents, and the papers and documents, forming the subject of this motion, were seized and removed to the offices of the Prohibition authorities. It is conceded that the warrant of arrest, addressed to the Marshal of the District, could not be executed by Prohibition agents even though acting on official business. It is not disputed, either, that the warrant was invalid in that the complaint was palpably insufficient, and no attempt is made by the Government to justify the seizure on the basis of the warrant. Indeed, it is insisted by the Government that no use was made of the warrant at the time of the arrest, and that Agent O'Brien only took the papers with him "for the purpose of reference as to the addresses of the various defendants." This, however, is contradicted by the defendants Gowen and Bartels, who state in their moving affidavits that Agent O'Brien described the papers to them at the time of the arrests as "search warrants", and exhibited them to justify the demand for a search of the offices. On that issue, I am inclined to accept the story of the defendants, as I do not think it is at all reasonable to suppose that the Prohibition agents did not make some use of the warrant when challenged to show the authority under which they were proceeding in making the arrests. And I am satisfied they were challenged to show their authority, as arrests and seizures of the kind described in [fol. 86] these papers are not ordinarily made without some demand for credentials.

The question is whether the seizure can be sustained as an incident to an arrest without a warrant, when a con-

cededly invalid warrant was exhibited, and probably made use of, at the time of the arrest. If the arrest was lawfully made, the contemporaneous search of the offices, and the seizure of the "things connected with the crime as its fruits or as the means by which it was committed," was justified (Agnello v. U. S., 269 U. S. 20, 30; Carroll v. U. S., 267 U. S. 132, 158; Lee Kwong Nom v. U. S., 20 Fed. (2) 470-472).

The Prohibition agent who made the arrests had no authority other than that of a private person making an arrest without a warrant. Agnello v. U. S., 290 Fed. 671, 683, modified on another point in 269 U. S. 20, U. S. v. Goldman, 1924, D. C. S. D. N. Y. Unreported Opinion of Mack, C. J. But it is well settled that when a felony has in fact been committed, a private person may arrest without a warrant if he has reasonable grounds to believe that the person arrested committed the crime (Brady v. U. S., 300 Fed. 540; Carroll v. U. S., 267 132, 161). In the Carroll case (supra), Chief Justice Taft quotes with approval the following definition of probable cause from Stacey v. Emery, 97 U. S. 642, 645:

"If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."

The information constituting probable cause may be obtained from others as well as from personal observation, [fol. 87] provided the facts are clearly established, and are sufficient to warrant a man of reasonable caution in the belief that the person arrested is guilty of the crime charged (Brady v. U. S., 300 Fed. 540; King v. U. S., 1 Fed. (2) 931; White v. U. S. 16 Fed. (2) 870; Prichett v. Sullivan, 182 Fed. 480, 482; U. S. v. Rembert, 284 Fed. 996).

I think the affidavits of Braidwood, Calhoun and O'Brien sufficiently establish for the purpose of this motion not only that a felony had been committed but also that Agent O'Brien had, prior to the arrests, reasonable cause to believe that the defendants Gowen and Bartels were parties to its commission. The affidavit of Braidwood describes in considerable detail extensive and open violations of the

Prohibition Act, and the connection of both defendants with the alleged conspiracy. This affidavit is a recital of specific facts within the personal knowledge of Braidwood, and covers a substantial period of time, dating back as far as March, 1927. The information obtained by Braidwood was communicated to Calhoun prior to June 5, 1929, and Calhoun thereupon made an independent investigation which corroborated the facts given to him by Braidwood. The affidavits then alleged that all of these facts, as ascertained by Braidwood and Calhoun, were told to Agent O'Brien by Calhoun prior to the arrest on June 6, 1929.

With this information in his possession, Agent O'Brien had reasonable grounds to believe that the defendants Gowen and Bartels had committed the felony described in the affidavits. There was, therefore, probable cause for the arrests. And the possession or use by Agent O'Brien [fol. 88] of the invalid warrant of arrest, issued by the Commissioner on June 5, 1929, did not render illegal arrests, which could lawfully have been made without it (Stallings v. Splain, 253 U. S. 339, 342; Lee Kwong Nom v. U. S. 20 Fed. (2) 470; Vachina v. U. S. 283 Fed. 35; Dowling v. Collins, 10 Fed. (2) 62).

It follows that the seizure of the papers and documents made contemporaneously with, and as an incident to, the arrests was lawful.

I do not deem it necessary or advisable to examine orally the persons whose affidavits have been presented on this motion, as I think the facts are sufficiently established by the affidavits themselves. It is, of course, understood that the findings of facts for the purpose of this motion are entirely without prejudice to the trial of the action.

The motion for the return of the documents and papers is, therefore, denied.

In disposing of this motion, as above indicated, I do not wish to be understood as approving the practice followed by the Government in making these arrests. I can see no adequate reason why arrests of this kind should not be made by the United States Marshal under valid warrants issued in advance, and I think it would be most unfortunate if any other practice should be generally followed.

Dated December 9, 1929.

(Sgd) Alfred C. Coxe, U. S. D. J.

[fol. 89] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION FOR REARGUMENT

SIR: Please take notice that upon the annexed affidavit of J. Edward Lumbard, Jr., verified the 16th day of December, 1929, the defendants Philip D. Gowen and William Bartels, and the petitioner Go-Bart Importing Company, Inc., will move this Court at a Term for Motions to be held in Room 331 of the Old Post Office Building, Broadway at Park Row, Borough of Manhattan, City of New York, on the 26th day of December, 1929, at 10:30 o'clock A. M. or as soon thereafter as counsel can be heard for an order directing a re-argument of the motion in the within action heretofore made by the said defendants Philip D. Gowen and William Bartels and the said petitioner Go-Bart Importing Company, Inc., for an order directing the return to them of certain papers and documents and restraining the complainant and each of its officers, clerks, attorneys, agents, servants and employees and all other persons acting under its authority or direction from directly or indirectly using as evidence the said papers and documents, and granting the said defendants Philip D. Gowen and William Bartels and the said peti-[fol. 90] tioner Go-Bart Importing Company, Inc., leave to examine orally, under oath, Eugene R. O'Brien, William J. Calhoun, Ernest Braidwood, Edward Collins and Harold G. Sipe, and for such other and further relief as to the Court may seem just and proper.

Dated New York, December 16, 1929.

Yours, &c., J. Edward Lumbard, Jr., Attorney for Defendants Philip D. Gowen and William Bartels and the Petitioner Go-Bart Importing Co., Inc.

Office & Post Office address: 225 Broadway, Borough of Manhattan, City of New York.

To Charles H. Tuttle, Esq., United States Attorney, Southern District of New York, Old Post Office Building, New York, N. Y.

[fol. 91] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF J. EDWARD LUMBARD, JR., IN SUPPORT OF MOTION FOR REARGUMENT

STATE OF NEW YORK,
City and Southern District of New York, ss:

J. Edward Lumbard, Jr., being duly sworn, deposes and says:

That he is the attorney for the defendants Philip D. Gowen, William Bartels and for the petitioner, Go-Bart Importing Company, Inc.

That on August 22, 1929, the said defendants Philip D. Gowen and William Bartels and the said petitioner Go-Bart Importing Company, Inc., secured an order to show cause signed by Honorable Charles A. Boynton, United States District Judge, for the return of certain papers and documents and for the suppression of said papers and documents as evidence. That subsequently argument was had on the said order to show cause, before Honorable Alfred C. Coxe, United States District Judge, who on the 9th day of December, 1929, led an opinion denying the relief asked for by the defendants and the said petitioner.

[fol. 92] That subsequent to the filing of the opinion by the Court, your deponent has been informed and has come into possession of information which in the opinion of your deponent is important for the proper consideration of said order to show cause and a determination of the rights of the said defendants and the said petitioner.

That the affidavits previously filed by the said defendants and the said petitioner in support of their motion for the return of the books and papers, and their suppression from use in evidence showed that a complaint had been filed before U. S. Commission Garrett W. Cotter in the Southern District of New York by one William J. Calhoun on June 5, 1929; that on the same day, the said Commissioner had issued warrants for the arrest of the said defendants, Philip D. Gowen and William Bartels, and other persons; that agents and subordinates of the said William J. Calhoun had exhibited the said warrants of arrest to the

defend-nts and others at 200 Fifth Avenue and had there arrested the said Philip D. Gowen and the said William Bartels and other persons, although none of them were deputized to do so by the United States Marshal for the Southern District of New York, and neither said Marshal nor any of his deputies were present.

That the affidavits filed by the said defendants and the said petitioner further stated that after being arrested the said defendants and others arrested were arraigned before the United States Commissioner on the said complaint of the said William J. Calhoun and were held in bail for their appearance.

That your deponent further states that since the said ar- [fol. 93] raignment and holding of the defendants in bail, no further proceedings of any kind or nature have been taken against the said defendants and that they are still being held in bail to answer the complaint before the United States Commissioner. The defendants did not waive examination upon arraignment and a date was set for a hearing on the complaint. The hearing date has been adjourned from time to time and no hearing has been held.

That affidavits of Ernest Braidwood, William J. Calhoun and Eugene R. O'Brien were filed on behalf of the complainant in reply to the affidavits filed in support of the said motion. That those affidavits sought to show that Eugene R. O'Brien, the arresting officer, had had probable cause to believe that Philip D. Gowen, William Bartels and others had committed the felony of conspiring to commit an offense against the United States at the time that O'Brien made said arrests.

That the affidavit of Eugene R. O'Brien, the arresting officer, specifically stated that the arrests had not been made on any warrant issued by the U. S. Commissioner and that O'Brien did not serve or attempt to serve or execute any warrant of arrest and that O'Brien made no return on said warrant; that O'Brien stated in his affidavit on page 2:

"Deponent took a certified copy of the said complaint to which was attached a certified copy of a warrant of arrest for all defendants in the said complaint for the purpose of reference as to the names of the various defendants."

[fol. 94] That your deponent is now informed of further facts in regard to the arrest of the defendants as follows:

That after the arrest of the defendants they were taken to the Old Post Office Building at Broadway and Park Row, and the arresting officer O'Brien went into the office of the United States Marshal, Room 207 of said building, and he or his superior officer or some representative of the office of the United States Attorney, requested the United States Marshal and his deputies in said office to make a return to the U. S. Commissioner on said warrant to show that the Marshal had executed the same. That thereupon the United States Marshal refused to make such return but the United States Marshal went into the office of the United States Commissioner in Room 314 of said Old Post Office Building and there took the defendants in custody and presented them to the United States Commissioner; that thereafter, said United States Marshal caused entries to be made in the dockets in his office showing that he, on the 6th day of June, 1929, had arrested the said defendants.

Your deponent is further informed that the United States Commissioner, who issued the warrants, thereafter collected a fee from the Department of Justice, which fee was based upon the fact that a return had been made on these warrants by the United States Marshal.

Your deponent has, from time to time, made diligent inquiry in regard to any return made by the Marshal on these warrants; he has made a search of such records as he was permitted to see in the office of the United States Commissioner and from all the information which he was able to [fol. 95] obtain he has had no knowledge of any of these facts until after the argument of the motion and also after the court rendered its opinion on December 9, 1929; that this information was communicated to him by other attorneys acting for other defendants in this same matter. Your deponent has been diligent in securing all the information he could but has been unable to make a search of the records in the office of the United States Marshal and he has further been unable to verify any of these facts, in regard to the part played by the United States Marshal and his deputies but he believes such facts to be true.

Your deponent further urges that a rehearing be granted to defendants Philip D. Gowen and William Bartels and the petitioner Go-Bart Importing Company, Inc., for the following reasons:

1. It appears from the additional facts which have just come to your deponent's attention that the arrest of Philip D. Gowen and William Bartels and others arrested on June 6, 1929, by Agent O'Brien and the agents assisting him, were made under and by virtue of a warrant of arrest issued by the United States Commissioner pursuant to a complaint sworn to by William J. Calhoun before the said Commissioner on June 5, 1929, and that said arrests were docketed by the United States Marshal as having been made by him, and that fees were collected by the United States Commissioner because of the fact that the arrests had been made by the United States Marshal and that he had returned to him the defendants named in the warrant. Your deponent is, therefore of the opinion that the United States of America, the complainant, cannot now claim that [fol. 96] the arrests were not made pursuant to said complaint and said warrant and cannot now set up the claim that said arrests were made by Agent O'Brien on the ground that he had probable cause to believe that the defendants had committed a felony.

2. The Court has already indicated in its opinion its disbelief as to certain portions of the affidavit of Special Agent O'Brien in which affidavit O'Brien seeks to set forth facts showing that he had probable cause to believe that the defendants had committed a felony at the time he arrested them. The additional facts set forth above by your deponent show that the court has not had before it a complete picture of how the arrests of the defendants were made on the 6th day of June, 1929, and it appears that the affidavit of Special Agent O'Brien is misleading, and it further appears that the statement made in his affidavit and on which the Court rendered its opinion that he had probable cause to make said arrest are extremely improbable and should be further examined by the court. Your deponent further urges he should be given the opportunity as counsel for the defendants and the petitioner, to examine Agent Eugene R. O'Brien and William J. Calhoun and Ernest Braidwood on the basis of the statements made in their affidavits heretofore filed in reply to the application made by your deponent.

Wherefore your deponent respectfully prays that the Court grant a re-argument in this matter to the defendants

and the petitioner and that an order be entered permitting your deponent to orally examine, under oath, the said [fol. 97] Eugene R. O'Brien, William J. Calhoun, Ernest Braidwood, Edward Collins and Harold G. Sipe.

J. Edward Lumbard, Jr.

Sworn to before me this 16th day of December, 1929. J. Cassin Healy, Notary Public, Westchester Co. N. Y. Clk's No. 593, Reg. No. 1H415. Commission expires March 30, 1931. (Seal.)

IN UNITED STATES DISTRICT COURT

ORDER OF COXE, D. J., DENYING ORDER TO SHOW CAUSE AND MOTION TO REARGUE—Dec. 27, 1929

The defendants Philip D. Gowen and William Bartels and the petitioner Go-Bart Importing Company, Inc., having [fol. 98] moved this Court, and the said motion having regularly come on to be heard on the 1st day of November, 1929, for an order directing the return of certain papers and documents to the said Philip D. Gowen, the said William Bartels and the said Go-Bart Importing Company, Inc., and enjoining and restraining the complainant and each of its officers, clerks, attorneys, agents, servants and employees and all other persons acting under its authority or direction from directly or indirectly using as evidence the said papers and documents, and the said Philip D. Gowen, the said William Bartels and the said Go-Bart Importing Company, Inc., having further moved this Court for a rehearing of the said motion,

Now upon reading and filing the order to show cause dated August 22, 1929, signed by the Honorable Charles A. Boynton, United States District Judge, and the affidavits of the defendants Philip D. Gowen and William Bartels, verified the 21st day of August, 1929, the affidavit of the petitioner Go-Bart Importing Company, Inc., by William Bartels, verified the 21st day of August, 1929, and the affidavits of the defendants Philip D. Gowen and William Bartels, and Ray Gardner, George Heath, William B. Flynn, Robert McCauley, John R. MacNesbitt, Gertrude In-

teman and Joseph M. Dooley, all verified on the 30th day of October, 1929, and the affidavits of William Howard, John B. Hobby, Milfred A. Gants and Robert Nelson, all verified the 31st day of October, 1929, in support of the said motion and the affidavits of Ernest Braidwood and Eugene R. O'Brien, verified the 24th day of October, 1929, the af- [fol. 99] fidavit of William J. Calhoun, verified the 25th day of October, 1929 and the affidavits of Harold G. Sipe, and Edward Collins, both verified the 4th day of November, 1929, in opposition to the motion, and the affidavit of J. Edward Lumbard, Jr., verified the 16th day of December, 1929, asking for a re-hearing of the said motion; and after hearing J. Edward Lumbard, Jr., in support of the said motion and Charles H. Tuttle, United States Attorney for the Southern District of New York (Robert B. Watts of counsel) in opposition thereto, and after reading and filing the opinion of the court dated the 9th day of December, 1929, it is

Ordered that the said motion be and the same hereby is denied; and it is further

Ordered that the motion for a rehearing of the said motion be and the same hereby is denied.

Alfred C. Coxe, U. S. D. J.

[fol. 100] In United States District Court

[Title omitted]

Notice of Appeal

Sir: Please take notice that the plaintiffs-in-error, Go-Bart Importing Company, Inc., Philip D. Gowen and William Bartels, hereby appeal to the United States Circuit Court of Appeals held in and for the second Circuit, from an order and decree signed by the Honorable Alfred C. Coxe, United States District Judge, and entered herein on the 27th day of December, 1929, denying the motion of the said plaintiffs-in-error for an order directing the return of certain documents and papers to them and restraining the defendant-in-error and each of its officers, clerks, attorneys, agents, servants, and employees and all other persons act-

ing under its authority or direction, from directly or indirectly using as evidence the said papers and documents, and that the said plaintiffs-in-error hereby appeal from [fol. 101] each and every part of the said Order and Decree as well as from the whole thereof.

Dated New York, N. Y., December 27, 1929.

Yours, etc., J. Edward Lumbard, Jr., Attorney for the Plaintiffs-in-Error.

Office and P. O. Address: 225 Broadway, Borough of Manhattan, City of New York.

To Charles H. Tuttle, Esq., United States Attorney, Southern District of New York, Old Post Office Building, Broadway and Park Row, N. Y. C.

[fol. 102] IN UNITED STATES DISTRICT COURT

[Title omitted]

APPEAL FROM ORDER DENYING ORDER TO SHOW CAUSE AND MOTION TO REARGUE

To the Honorable Judges of the United States District Court for the Southern District of New York:

Come now, the plaintiffs-in-error, Go-Bart Importing Company, Inc., Philip D. Gowen and William Bartels, by their attorney, J. Edward Lumbard, Jr., and feeling aggrieved by the order and decree signed by the Honorable Alfred C. Coxe, entered herein on Decembbr 27, 1929, denying the motion of the said plaintiffs-in-error for an order directing the return of certain documents and papers to them and restraining the defendant-in-error and each of its officers, clerks, attorneys, agents, servants and employees and all other persons acting under its authority or direction, from directly or indirectly using as evidence the said papers and documents, and complain that in the record and proceedings had in such case, manifest error has hap-[fol. 103] pened to the great damage of the petitioners as set forth in the assignments of error annexed hereto.

Wherefore the said plaintiff-in-error, Go-Bart Importing Company, Inc., Philip D. Gowen ,and William Bartels, do hereby appeal from the said order and decree to the Circuit Court of Appeals for the Second Circuit and pray that their appeal may be allowed and that a transcript of the record of the proceedings and papers upon which said order and decree is made, duly authenticated, be sent to the Circuit Court of Appeals for the Second Circuit and that the same may be corrected.

Dated New York, N. Y., December 27, 1929.

J. Edward Lumbard, Jr., Attorney for the Plaintiffs-in-Error.

Office and P. O. Address: 225 Broadway, Borough of Manhattan, City of New York.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

The within appeal is allowed. The defendant-in-error and each of its officers, clerks, attorneys, agents, servants and employees and all other persons acting under its authority or direction and each and every one of them and all in privity with them are stayed from, directly or indirectly, using as evidence the papers and documents which are the [fol. 104] subject of this appeal, or any information, notes or memoranda made from the search or investigation of such papers and documents, or any photostatic copies or reproductions made of such papers and documents pending the entry of an order determining or dismissing the appeal.

Alfred C. Coxe, U. S. D. J.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

Come now, the plaintiffs-in-error, Go-Bart Importing Company, Inc., Philip D. Gowen and William Bartels, and

file the following assignments of error upon which they will rely upon their appeal from the order and decree entered herein on December 27, 1929, denying the motion of the said plaintiffs-in-error for an order directing the return of certain documents and papers to them and restraining the defendant-in-error and each of its officers, clerks, attorneys, [fol. 105] agents, servants and employees and all other persons acting under its authority and direction, from directly or indirectly, using as evidence the said papers and documents; to wit: that the Court erred in making the said order dated December 27, 1929, upon the following grounds:

1. That the warrant of arrest was improperly issued and in violation of the Fourth Amendment of the Constitution of the United States.

2. That the agents had no power to execute the warrant of arrest.

3. That there was no probable cause for believing that a felony had been committed.

4. That no felony had in fact been committed and there was no probable cause for believing the defendants to have committed it.

5. That at the time of making the arrests, the agents had no probable cause to believe that the persons arrested had committed a felony.

6. That the agents were not peace officers and could not arrest except where a felony had actually been committed and were governed by the same rules of law under which a private person may arrest another.

7. That the agents relied upon the warrant of arrest in making the said arrest and not upon probable cause to believe that a felony had been committed.

8. That the agents having relied upon the warrant of [fol. 106] arrest could not justify the arrest by showing probable cause for believing that a felony had been committed.

9. That the arrests being illegal, the arresting officers had no power or authority in law to search the premises and seize papers and records.

10. That in any event the agents had no power or authority in law to search the premises and seize papers and records which were not instruments of any crime.

11. That the agents had no power or authority to break into locked cabinets and safes and take papers and records therefrom.

Wherefore the plaintiffs-in-error pray that the order of the District Court be reversed.

J. Edward Lumbard, Jr., Attorney for the Plaintiffs-in-Error.

Office and P. O. Address: No. 225 Broadway, Borough of Manhattan, City of New York.

[fol. 107] Citation in usual form, omitted in printing.

[fol. 108] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed upon by the parties.

Dated New York, January —, 1930.

J. Edward Lumbard, Jr., Attorney for the Appellants. Charles H. Tuttle, United States Attorney, Attorney for the Appellee.

[fol. 109] Clerk's certificate to foregoing transcript omitted inprinting.

[fol. 110] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

GOWEN et al., Defendants; Go-Bart Importing Company, Inc., Philip D. Gowen and William Bartels, Appellants.

Before Manton, Swan and Augustus N. Hand, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York

OPINION

Motion by Go-Bart Importing Company, a corporation, and by two individuals, Gowen and Bartels, for an order directing "the United States" to restore to them documents and papers alleged to have been illegally seized by prohibition agents, and for the suppression of such property as evidence. From an order denying the motion, the movers have appealed. Modified.

The seizure was not made under a search warrant. Justification is rested upon the ground that it was incidental to the arrest of Gowen and Bartels upon a charge of conspiracy to violate the National Prohibition Act. The facts concerning their arrest and the seizure of property in con- [fol. 111] nection therewith, may be summarized from the moving affidavits as follows:

Go-Bart Importing Company was engaged "in the business of importing", with offices consisting of three rooms at 200 Fifth Avenue, New York, Gowen being president and Bartels secretary-treasurer of the corporation. On the morning of June 6, 1929, agent O'Brien and two other special agents of the Bureau of Prohibition entered the offices of the corporation, and agent O'Brien placed under arrest Bartels, who was found there, and Gowen, who entered later. Upon their arrest their persons were searched and miscellaneous papers and memoranda taken from them. Under threat that force would be used, they were compelled

to unlock their desks and a safe, from which books of account, letter files, insurance policies, cancelled checks, and other documents were taken and carried to the office of William J. Calhoun, special agent in charge, where he and the United States Attorney have been examining them. Some of the documents and papers belong to Go-Bart Importing Company; but no attempt is made in the affidavits to segregate those belonging to the corporation from those of the individual appellants.

The moving affidavits also allege that agent O'Brien purported to act under a warrant of arrest and search. Agent O'Brien's affidavit denies this. He admits that he had possession of a certified copy of a warrant of arrest issued by a United States Commissioner for the Southern District of New York, and directed to the marshal, upon a complaint made by said William J. Calhoun, but asserts that he used [fol. 112] it merely as a memorandum of the names of the persons to arrest. He made no return of service of the warrant and no attempt is made to sustain the arrest by reason of it. The claim is that O'Brien had probable cause to arrest without warrant. The facts upon which this claim is based are set forth in the opposing affidavits of Braidwood, Calhoun and O'Brien. Braidwood's affidavit discloses that he had had dealings with Gowen, Bartels and others at the office of Go-Bart Importing Company where the arrest was made, over a period of eighteen months, beginning in March, 1927. He had bought liquor from them and had learned their methods of conducting their business of importing and selling liquor. The facts are set forth in detail, and these facts he reported to said Calhoun about April 15, 1929. Calhoun's affidavit recites that prior to June 6, 1929, he had received oral and written reports from Braidwood setting forth the facts stated in Braidwood's affidavit; that he had made independent investigations which corroborated these facts; and that he had related them to agent O'Brien and had assigned him to investigate further the criminal conspiracy of Gowen, Bartels, et al. O'Brien's affidavit alleges that prior to the arrest he had been informed by Calhoun of the facts stated in Braidwood's affidavit and of Calhoun's independent corroboration of such facts, and from such information he believed that Go-Bart Importing

Company, Gowen, Bartels, and other individuals had committed the felony of conspiring to violate the laws of the United States pertaining to intoxicating liquors. He had also seen Calhoun's complaint filed with the United States Commissioner. His affidavit then recites the story of the [fol. 113] arrest, search and seizure, not differing materially from the summary hereinbefore set forth, except that he denies that he purported to serve any warrant of arrest or search, and adds the fact that a dozen bottles of intoxicating liquor were found in the search of the offices. The moving affidavits do not mention the liquor or ask for its return.

On the day of their arrest Gowen and Bartels were taken before the United States Commissioner and were held in bail to answer the complaint upon which the aforesaid warrant was issued. On information and belief it is stated in an affidavit by appellants' attorney that the United States Marshal has made a return of service of the warrant although neither he nor any deputy marshal was present when agent O'Brien arrested Gowen and Bartels. Nothing further has been done in the proceeding before the commissioner.

On August 22nd, the appellants instituted the present proceeding in the district court, and obtained an order to show cause directed to "the United States of America, the complainant herein". The order bears the same title as the complaint before the commissioner. It may be noted that Go-Bart Importing Company was not named in said complaint. On December 27th the motion for restoration of the papers and suppression of them as evidence was denied, and an appeal was allowed. Pending the appeal, the United States, its officers and agents are enjoined from using as evidence the documents and papers, or information obtained therefrom.

[fol. 114] J. Edward Lumbard, Jr., for Appellants; Seymour B. Quel, of Counsel.

Robert B. Watts, Assistant United States Attorney, for Appellee.

SWAN, Circuit Judge:

The major premise of the appellants' argument is that the Fifth Amendment protects every person against in-

crimination by the use of evidence obtained through unreasonable search or seizure in violation of rights secured to him under the Fourth Amendment. This is unassailable. Agnello v. United States, 269 U. S. 20, 34; Marron v. United States, 275 U. S. 192, 194. The minor premise is that the seizure of the papers and documents in suit violated their rights under the Fourth Amendment. This the United States Attorney denies, asserting that the seizure was privileged as an incident to a lawful arrest of Gowen and Bartels. The legality of their arrest is, therefore, the first subject for consideration. It is challenged by the appellants upon the theory that an arresting officer who purports to act under a warrant may not justify on any other ground. It may be doubted whether an officer who makes no return of service of a warrant can be said to act under it; and whether the argument does not come to this: that an officer who tells the accused that he acts under a warrant can only justify by showing a legal warrant. But if it be assumed that O'Brien purported to act under the warrant, the contention that he may not otherwise justify cannot be sustained. As was said by the Supreme Court in Stallings v. Splain, 253 U. S. 339, 342, the possession of an insufficient warrant does not render illegal an arrest which [fol. 115] could lawfully be made without it. In numerous cases the insufficiency of search warrants has been held immaterial when the search and seizure might be otherwise justified. Marron v. United States, 275 U. S. 192; Vachina v. United States, 283 F. 35, 36 (C. C. A. 9); Fryar v. United States, 3 F. (2d) 598 (C. C. A. 6); Billingsby v. United States, 16 F. (2d) 754, 756; Lee Kwong Nom v. United States, 20 F. (2d) 470, 472 (C. C. A. 2); State v. The District Court, 231 Pac. 1107; cf. Murby v. United States, 293 F. 849, 852 (C. C. A. 1). These search warrant cases the appellants attempt to distinguish upon the ground that in them the arresting officers had evidence of crime committed in their presence, rather than probable cause to believe that the person arrested had previously committed a felony. The logic of the attempted distinction is not apparent, and we regard these cases as authorities against the appellants' first contention. See also Salisbury v. Commonwealth, 79 Ky. 425, involving an invalid warrant of arrest. Cases where a warrant is necessary to gain lawful entry to the

premises are distinguishable and have no application to the present situation.

The legality of the arrest is next attacked upon the ground tha O'Brien had no authority to arrest without warrant, because (1) a prohibition agent is not a peace officer; (2) the Treasury Regulations under which Prohibition agents act do not Sanction it unless crime is committed in the agent's presence; and (3) if the agent relies only upon the right of a private individual to arrest without warrant, [fol. 116] he did not have probable cause to believe that Gowen and Bartels had committed the felony for which they were arrested. We pass at once to the third branch of the argument, for if this is decided adversely to the appellants it will be unnecessary to consider the other two.

The New York Code of Criminal Procedure provides:

"Section 183. A private person may arrest another: * * *
2. When the person arrested has committed a felony, although not in his presence."

This in effect is declaratory of the common law which concededly permits a peace officer or a private individual to arrest without warrant where a felony has in fact been committed by the person arrested and the person making the arrest had probable cause for so believing. See Carroll v. United States, 267 U. S. 132, 161; Brady v. United States, 300 F. 540 (C. C. A. 6); Bishop, New Crim. Proc., 2nd ed. sec. 181. Braidwood's affidavit sets forth ample facts, none of which are denied, to show that Gowen and Bartels had conspired to violate the National Prohibition Act. We do not understand appellants to deny that Braidwood would have had sufficient reason to believe them guilty of a felony to justify an arrest by him without a warrant. The objection is that O'Brien's belief was based not upon personal knowledge but upon information obtained from his superior officer Calhoun, who in turn had received from Braidwood most of the information he imparted to O'Brien. It is urged that the "probable cause" which will justify arrest of a felon must be founded upon more than unsworn hearsay. But neither in reason nor upon the authorities is the rule so limited; rather, the test is whether the belief

[fol. 117] is reasonable. In Carroll v. United States, supra, the court said (p. 161):

"The necessity for probable cause in justifying seizures on land or sea, in making arrests without warrant for past felonies, and in malicious prosecution and false imprisonment cases has led to frequent definition of the phrase. In Stacey v. Emery, 97 U. S. 642, 645, a suit for damages for seizure by a collector, this Court defines probable cause as follows:

'If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient.'"

Instances where the arrest has been sustained although the arresting officer acted on information obtained from others, rather than on personal knowledge, may be found in Brady v. United States, supra; King v. United States, 1 F. (2d) 931 (C. C. A. 9); White v. United States, 16 F. (2d) 870. Measured by the test above stated, we think O'Brien was justified. He had received his information from his superior officer, whose own investigations had corroborated the facts reported by investigator Braidwood. Calhoun, the superior officer, had sworn to a complaint charging Gowen and Bartels with the crime. It is true that that complaint was legally insufficient, but it may nevertheless be considered as affording O'Brien an additional reason for giving credence to the detailed facts Calhoun had stated to him concerning the conspiracy. The source of his information and the detailed character of it were such as to justify a cautious and prudent man in reaching the same conclusion as did O'Brien. It is urged that to sanction arrest upon information of this character and to permit a search as incidental to the arrest, makes it easy to fabricate a justification which the arresting officer [fol. 118] did not have when he made the arrest. This objection goes to the credibility of the officer's testimony, not to his right to make the arrest. Knowledge gained from the arrest or from a seizure incidental thereto cannot be used to support a finding of probable cause. See United States v. Maresca, 266 F. 713, 725 (D. C. S. D. N. Y.). But nothing is shown to raise doubt that O'Brien had received

before the arrests the information which he says he had. We conclude that the arrests were legal.

Granting this, it is urged that the search and seizure were illegal. In considering this argument it will be convenient to differentiate between the papers found on the persons of Gowen and Bartels, and those found in the search of the safe, desks and offices. It is not, and cannot be, denied that papers taken upon the person of the accused in connection with his lawful arrest, may be retained for use upon his trial, if relevant thereto. Agnello v. United States, 269 U. S. 20, 30; United States v. Kirschenblatt, 16 F. (2d) 202, 203 (C. C. A. 2). Therefore with respect to the papers found upon the individual appellants the order denying their return was clearly right.

The privilege of search incidental to a lawful arrest is not limited to search of the person; it extends to the premises where the arrest was made and permits seizure of property there located and within the control of the accused, if it be contraband, as in Carroll v. United States, supra, or "things used to carry on the criminal enterprise" as in [fol. 119] Marron v. United States, 275 U. S. 192. In the latter case, Marron and others were charged with conspiracy to maintain a nuisance in violation of the Prohibition Act. Having been convicted, Marron challenged the judgment on the ground of error in admitting evidence consisting of a ledger and certain bills seized by prohibition agents upon the premises where a fellow conspirator, Birdsall, had been arrested. The ledger showed "inventories of liquors, receipts, expenses, including gifts to police officers, and other things relating to the business". The bills were for gas, electric light, water and telephone service furnished on the premises. At the trial there was evidence that Marron made most of the entries in the ledger and that he was concerned as proprietor or partner in carrying on the business of selling intoxicating liquors. In affirming the conviction the court said (p. 198):

"When arrested, Birdsall was actually engaged in a conspiracy to maintain, and was actually in charge of, the premises where intoxicating liquors were being unlawfully sold. Every such place is by the National Prohibition Act declared to be a common nuisance, the maintenance of which is punishable by fine, imprisonment or both. * * *

The officers were authorized to arrest for crime being committed in their presence, and they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise. Agnello v. United States, supra, 30; Carroll v. United States, 267 U. S. 132, 158; Weeks v. United States, supra, 392. The closet in which liquor and the ledger were found was used as a part of the saloon. And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. And, while it was not on Birdsall's person at the time of his arrest, it was in his immediately possession and control. The authority of officers to search and seize the things by which [fol. 120] the nuisance was being maintained, extended to all parts of the premises used for the unlawful purpose. Cf. Sayers v. United States, 2 F. (2d) 146; Kirvin v. United States, supra; United States V. Kirschenblatt, supra. The bills for gas, electric light, water and telephone services disclosed items of expense; they were convenient, if not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest."

This case the appellants attempt to distinguish upon the ground that the papers and ledger there seized were instruments of the crime of maintaining a nuisance while here the papers and documents are merely incriminatory evidence of the crime of conspiracy. We do not think the distinction can be substantiated. In the Marron case the crime charged was conspiracy to maintain a nuisance. Calhoun's complaint charged the identical crime. O'Brien's affidavit says that he placed Gowen and Bartels under arrest for "conspiring to violate the laws of the United States pertaining to intoxicating liquors." He does not expressly mention nuisance but the facts which he says he relied on—those stated in Braidwood's affidavit—show a conspiracy to maintain a nuisance and that a nuisance was maintained. Liquor was kept on the premises not usually in large quantities it is true, but rather as samples to show to purchasers.

Orders were there taken and paid for and sometimes deliveries were made at the office, though more often Braidwood obtained delivery at the "machine shop." It is true that the Marron premises were used as a saloon for retailing and drinking liquors, and the court refers to the officers' authority "to search and seize things by which the [fol. 121] nuisance was being maintained". But we cannot doubt that it is any less the maintaining of a nuisance within the statutory definition (27 U. S. C. A. 33) to conduct a wholesaling liquor business, even though only a small part of the liquor sold is kept on the premises or there delivered. The papers seized include names and addresses of customers with amounts outstanding as payable for liquors; detailed inventories of liquors received, sold, and delivered; individual receipts for liquor deliveries; letters and other correspondence having to do with the purchase, sale and delivery of liquors. These all come within the classification, applied in the Marron case to the bills, of things "so closely related to the business, it is not unreasonable to consider them as used to carry it on". Technically the papers may belong to the corporation rather than to its officers who were arrested; but the corporation was merely the cloak under which the individuals carried on their illegal business, and it, as well as they, was guilty of the conspiracy. No distinction can be based on the fact that Marran was a partner, while Gowen and Bartels were corporate officers. We regard the Marron case as controlling and as sustaining the seizure in suit. In United States v. Kirschenblatt, supra, this court laid down a more limited doctrine, but we do not think it can stand after the Marron decision.

Having disposed of the merits of the controversy it might seem unnecessary to say more; but in the interest of orderly procedure in cases of this type which are becoming so common, we shall discuss briefly the theory of proceedings for [fol. 122] the recovery of property alleged to be illegally seized.

First, as to the jurisdiction of the district court to entertain a summary motion of this nature as against the United States Attorney. Jurisdiction to give summary relief against an officer of the court is beyond doubt. See Cogen v. United States, 278 U. S. 221, 225; Matter of

Behrens (C. C. A. 2, opinion March 3, 1930). Nor do we question that a motion to prevent use by the United States Attorney of documents incompetent as evidence because illegally obtained by another officer of the government (Silverthorne Lumber Co. v. United States, 251 U. S. 385), may be made before there is any indictment or information pending against the maker of such motion. Perlman v. United States, 247 U. S. 7; Burdeau v. McDowell, 256 U. S. 465; Cogen v. United States, supra. Such officer of the court may be brought in by service of an order to show cause. As a matter of formal procedure, such order should be directed to him, not, as in the case at bar, to "the United States." But this informality may be ignored and we have treated the rule to show cause as if directed to the United States Attorney and also to agent Calhoun, who is alleged to have possession of the papers. Since the seizure is held valid, the appellants are entitled to no relief against the United States Attorney, and the order denying their motion as against him will be affirmed.

The district court's jurisdiction to control the disposition of property illegally held by one not an officer of the [fol. 123] court is a less simple problem. In Matter of Behrens, supra, we held that when forfeitable property is seized and held by prohibition officers, the legality of their seizure was to be determined in the forfeiture proceedings, not on summary motion for an order directing return of the property. Where, as here, the property consists of papers held for evidence not for forfeiture, the legality of the seizure cannot be so determined. On general principles it would seem that replevin, unless some statute forbids it, or a bill in equity, since temporary relief is sought against a threatened use of information contained in the papers, would be the appropriate remedy. See United States v. Casino, 286 F. 976, 978 (D. C. S. D. N. Y.); Sims v. Stuart, 291 F. 707, 709 (D. C. S. D. N. Y.); Applybe v. United States, 32 F. (2d) 873 (C. C. A. 9), rehearing denied 33 F. (2d) 897. We may assume, without the necessity of so deciding in the present case, that section 934 Rev. Stat. forbids replevin and that a bill in equity will lie to recover possession of papers illegally held by prohibition officers. See Sims v. Stuart, supra; 27 USCA sec. 45; Mayland v. Soper, 270 U. S. 9. Apparently the underlying assumption

of the appellants has been that an order directing the United States to show cause if served upon the district attorney will bring into court any representative of the government in any of its divers branches. This is wholly erroneous. See Weinstein v. Attorney General, 271 F. 673, 675 (C. C. A. 2); Applybe v. United States, supra. We are not informed of any statutory provision which gives the [fols. 124 & 125] district court summary jurisdiction to direct the return of papers illegally held by prohibition officers who have not acted under process of the court. Consequently so far as the appellants' motion sought relief against agent Calhoun the order to show cause should have been discharged.

The order appealed from must be modified accordingly. With respect to the relief asked against the United States Attorney, the order is affirmed: in respect to all other relief asked, the order is reversed and with directions to discharge the rule to show cause.

[fol. 126] In United States Circuit Court of Appeals, Second Circuit

United States, Plaintiff-Appellee,

v.

Go-Bart Importing Company, Inc., et al., Impleaded, etc., Appellants

Appeal from the District Court of the United States for the Southern District of New York

Decree—Filed Apr. 15, 1930

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be, and it hereby is, modified in accordance with the opinion of this court.

It is further ordered that a Mandate issue forthwith to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 127] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 128] In Supreme Court of the United States

Order Allowing Certiorari—Filed June 2, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,021. U. S. Circuit Court of Appeals, Second Circuit. Term No. 111. Go-Bart Importing Co., Philip D. Gowen and William Bartels, petitioners, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed May 12, 1930. File No. 35,021.

FILE COPY

Office Supreme Court, U. S.
FILED
OCT 4 1930

No. 111

In the Supreme Court of the United States

OCTOBER TERM, 1930

GO-BART IMPORTING COMPANY, INC., PHILIP D. GOWEN, AND WILLIAM BARTELS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO ADVANCE

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 111

GO-BART IMPORTING COMPANY, INC., PHILIP D. GOWEN, and WILLIAM BARTELS, petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO ADVANCE

Now comes the Solicitor General and moves that the Court advance the above-entitled cause for hearing to an early day convenient to the Court.

The question involved is whether the petitioners are entitled to the return of documents seized by Federal prohibition officers on June 6, 1929, in a search of premises upon which they had immediately prior thereto placed the petitioners Gowen and Bartels under arrest.

At the time of making such arrests the officers had in their possession defective warrants for the arrest of the said petitioners. They were also in possession of information which the Government

contends gave them probable cause to believe that Gowen and Bartels were engaged in a conspiracy to violate the National Prohibition Act. The evidence is conflicting as to whether the arrest warrants were served, but both courts below declined to order a return of the seized documents or a suppression of their use as evidence, holding that, regardless of the warrants, the officers were authorized to make the arrests by reason of the information in their possession respecting the commission of a felony by the petitioners, and that as an incident to such arrests, they were justified in making the search and seizure complained of. A writ of certiorari was granted by this Court on June 2, 1930.

As the use of the seized papers as evidence is regarded by the Government as essential to its case against the petitioners, the institution of criminal proceedings has been withheld pending a final adjudication as to the validity of the search and seizure. In order to prevent undue delay in the administration of the criminal law involved, it is submitted that the above entitled case should be assigned for an early hearing.

Opposing counsel have been notified of this motion.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

OCTOBER, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

FILE COPY

No. [redacted] 111

FILED
MAY 12 1930
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

GO-BART IMPORTING CO., PHILIP D. GOWEN and WILLIAM BARTELS,

Petitioners,

against

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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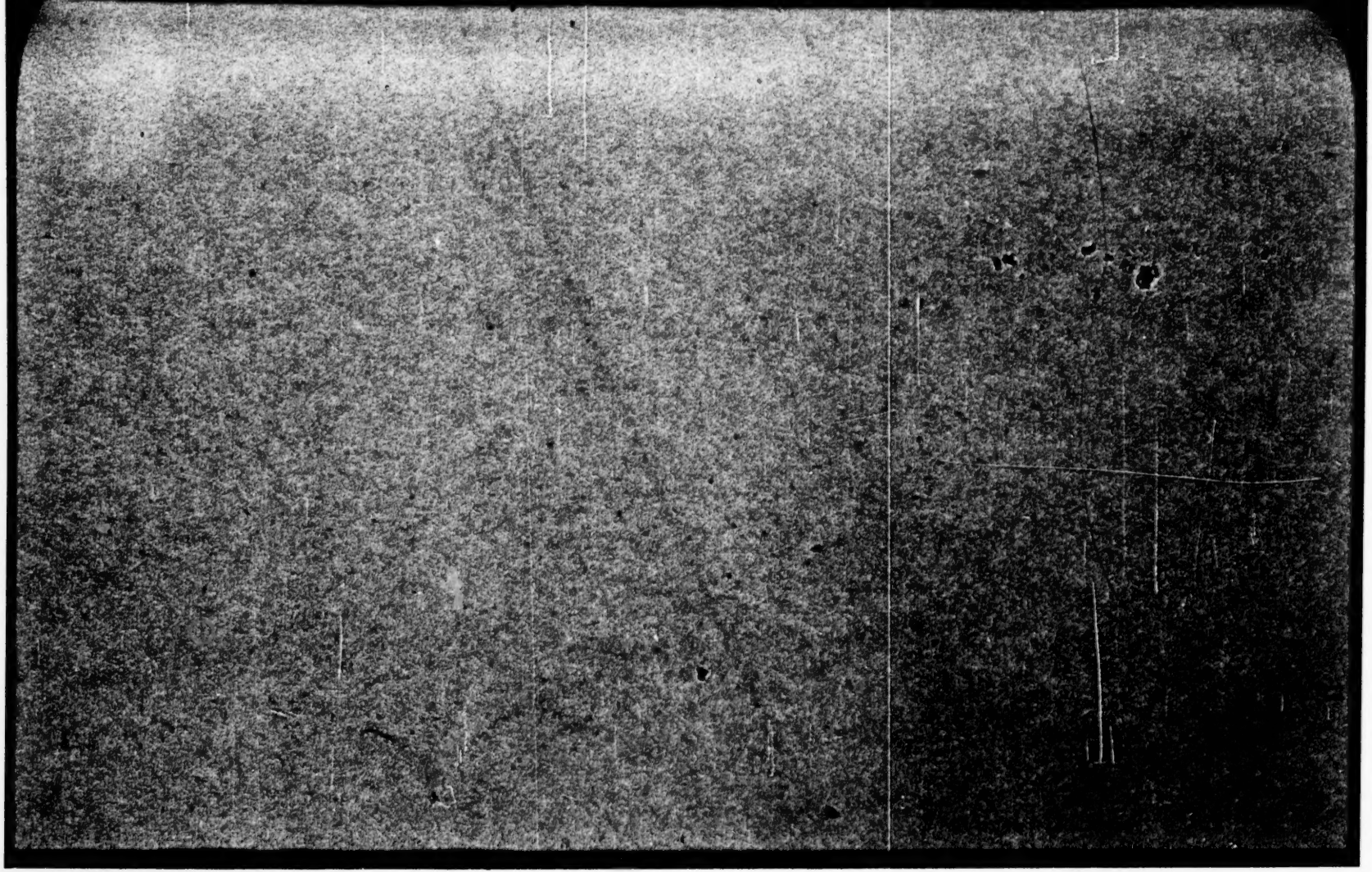

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PETITION

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Supreme Court of the United States

OCTOBER TERM, 1929.

GO-BART IMPORTING CO., PHILIP D. GOWEN and WILLIAM BARTELS,
Petitioners,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Go-Bart Importing Co., Philip D. Gowen and William Bartels, respectfully submit their petition for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Second Circuit in the above-entitled proceeding.

History of Case.

Petitioners commenced a proceeding in the United States District Court for the Southern District of New

York seeking an order directing the United States to restore to them documents and papers claimed to have been illegally seized by prohibition agents, and for the suppression of such property as evidence. The application was denied by an order of Hon. Alfred C. Coxe, District Judge (fols. 290-296). From this order an appeal was taken to the United States Circuit Court of Appeals for the Second Circuit. Cf. *Cogen* v. *United States*, 278 U. S. 221, 225. The Circuit Court of Appeals affirmed the order of the District Court. The opinion of the Circuit Court of Appeals was written by Hon. Thomas W. Swan, Circuit Judge. This petition is filed to obtain review of the decision of the Circuit Court of Appeals.

Statement of Facts.

On June 5, 1929, a prohibition agent, William J. Calhoun, swore to a complaint before United States Commissioner Cotter of the Southern District of New York, charging that the petitioners Gowen and Bartels and other named persons "did * * * conspire * * * to commit a nuisance against the United States * * * in violation of the National Prohibition Act." The overt act alleged was the purchase of a Peerless automobile (fols. 88-96).

The complaint was made entirely upon information and belief. The sources of the information and the grounds of belief were not stated.

The complaint, it is now conceded, was insufficient and totally invalid (fols. 253-254). Cf. *In re Rule of Court*, Fed. Cas. 12, 126.

Commissioner Cotter, nevertheless, thereupon issued a warrant for the arrest of petitioners Gowen and Bar-

tels, and the other individuals named in the complaint. The warrant was directed to the United States Marshal or any of his deputies (fols. 82-87).

The following day, June 6, 1929, Eugene R. O'Brien, prohibition agent and a subordinate of Calhoun, and two other prohibition agents, went to the office of the petitioner Go-Bart Importing Co., suite 1030, at 200 Fifth Avenue, New York, bearing a certified copy of the warrant of arrest (fols. 137, 142, 143).

Agent O'Brien and the other agents were not accompanied by the United States Marshal or any of his deputies (fol. 67).

Petitioner Bartels, secretary of the Go-Bart Co., and George Heath, an employee, were in the office of the Go-Bart Co. at the time of the entry of the agents (fol. 59).

The agents entered the premises of the Go-Bart Co., were requested to state their business, and thereupon exhibited a document claimed to be a search warrant and to authorize a search of the premises (fols. 60-61).

The agents then proceeded to ransack the premises (fol. 37). While they were doing this, petitioner Gowen entered the premises.

Agent O'Brien said to Gowen that he (O'Brien) had a warrant for Gowen's arrest and a warrant to search the premises, and exhibited to Gowen a paper claimed to be a search warrant and to authorize a search. The agents took from Gowen's person some keys and under threat of breaking into his desk and safe and forced Gowen to open them. The desk and safe were then searched and from them the agents took papers, documents and property, including journals, insurance policies, cancelled checks, index cards and other miscellaneous property. The agents rummaged at will through

two other desks belonging to the Go-Bart Co., taking therefrom papers and documents of the same nature (fols. 14-15, 61-62). No receipts were given for the articles taken (fol. 62).

Petitioner Bartels, Heath and another employee of the Go-Bart Co., one Gardiner, were arrested after the search, say petitioners (fol. 62); before the search, say the agents (fol. 147).

Thereafter petitioners were arraigned before Commissioner Cotter on a complaint of conspiracy to violate the National Prohibition Act (fol. 63). There has been no hearing on this complaint (fol. 277). So far as the record discloses there has been no indictment.

This proceeding was brought to obtain return of the papers and documents seized as above set forth, and to suppress use of them in evidence.

When this proceeding was commenced the agents attempted to justify their procedure by asserting that one Braidwood, an informer and an alleged accomplice of petitioners, not a Government employee, had told Agent Calhoun, who had in turn told Agent O'Brien, that petitioners had from their offices at 200 Fifth Avenue bought and sold liquor in violation of the National Prohibition Act during the preceding eighteen months (fols. 127-139; cf. fols. 97-126). An elaborate affidavit was submitted by Braidwood in this proceeding alleging facts tending to show petitioners guilty of such crime (fols. 97-126). It is also stated by Agent Calhoun that he independently investigated Braidwood's information and found it to be true, but that "the sources of these independent investigations conducted by deponent cannot be disclosed consistently with public justice" (fols. 130-131).

The agents, in their opposing affidavits, falsely and perjuriously attempted to deny that they had conducted the search upon the assumed authority of the warrant (fol. 146).

Judge Coxe held this denial false in the following language (fols. 254-256):

> "Indeed, it is insisted by the Government that no use was made of the warrant at the time of the arrest, and that Agent O'Brien only took the papers with him 'for the purpose of reference as to the addresses of the various defendants.' This, however, is contradicted by the defendants Gowen and Bartels, who state in their moving affidavits that Agent O'Brien described the papers to them at the time of the arrest as 'search warrants,' and exhibited them to justify the demand for a search of the offices. On that issue, I am inclined to accept the story of the defendants, as I do not think it is at all reasonable to suppose that the prohibition agents did not make some use of the warrant when challenged to show the authority under which they were proceeding in making the arrests. And I am satisfied they were challenged to show their authority, as arrests and seizures of the kind described in these papers are not ordinarily made without some demand for credentials."

Judge Coxe, however, denied the relief sought on the ground that the agents had reasonable cause to believe petitioners guilty of a felony; that the arrest was therefore lawful; and that the search was valid as an incident to such arrest.

But Judge Coxe said (fols. 263-264):

> **"In disposing of this motion as above indicated, I do not wish to be understood as approv-**

ing the practice followed by the Government in making these arrests. I can see no adequate reason why arrests of this kind should not be made by the United States Marshal under valid warrants issued in advance, and I think it would be most unfortunate if any other practice should be generally followed."

The order entered on Judge Coxe's decision was affirmed by the Circuit Court of Appeals.

Questions Presented.

1. In the light of the officers' wanton disregard of orderly procedure, was the arrest valid?

The decision that the arrest was valid is, it is believed, in conflict with the opinion of this Court in *Carroll* v. *United States*, 267 U. S. 132, with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Henderson* v. *United States*, 12 Fed (2d) 528, and with the decision of the District Court for Northern Illinois in *United States* v. *McHie*, 194 Fed. 894.

2. Under any circumstances, is the ransacking of desks and safes in a general and exploratory search for incriminatory papers justifiable as an incident to an arrest?

The upholding of the search and seizure in this is, it is believed, in conflict with the decision of this Court in *Boyd* v. *United States*, 116 U. S. 616.

Reasons for Granting the Petition.

It is respectfully submitted that the Court below erred in its determination of the questions stated above, and

that the effect of its decision is to sanction methods of enforcement historically repugnant to the Constitution.

In this case the agents have made a sorry record. The insufficient complaint, the disregard of the United States Marshal in the execution of the warrant, the cunning and high-handed search, the threats of force to compel the opening of locked containers, and the attempt to lie their way out, present a spectacle which cannot, it is respectfully submitted be reconciled with enforcement of the spirit of the Fourth Amendment.

To disregard orderly procedure and summarily arrest persons sitting peaceably in their offices upon the word of an accomplice and informer, uncorroborated so far as the record discloses, is in effect to violate the Amendment.

And, so far as our examination of the books discloses, *this is the first case that has ever sanctioned a general and exploratory search for incriminating papers as an incident to arrest or otherwise.*

The case, it is submitted, calls for an application of the rule announced in *Boyd* v. *United States*, 116 U. S. 616, 635: "It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

And repeated in *Byars* v. *United States*, 273 U. S. 28, 33-34:

> "The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may

seem to escape the challenge of illegality but which, in reality strike at the substance of constitutional right."

WHEREFORE, your petitioners pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify the case to this Court for review and determination, as provided by Section 240(a) of the Judicial Code, and that your petitioners may have such other and further relief in the premises as this Court may deem proper.

CHARLES DICKERMAN WILLIAMS,
J. EDWARD LUMBARD, JR.,
SEYMOUR B. QUEL,
Counsel for Petitioners.

New York City, N. Y., May, 1930.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1929.

GO-BART IMPORTING CO., PHILIP D. GOWEN and WILLIAM BARTELS, Petitioners,

against

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

Neither the opinion of the District Court nor the opinion of the Circuit Court of Appeals have as yet been reported.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered on April 15, 1930. The jurisdiction of this Court is invoked under Section 240-a of the Judicial Code, as amended by the Act of February 13, 1925.

Statement.

This is a petition for a writ of certiorari to review a decree of the Circuit Court of Appeals for the Second Circuit, affirming an order denying an application for the return of seized property. The facts have been sufficiently stated in the petition, but will be adverted to from time to time in the brief.

POINT I.

The agents' wanton disregard of orderly procedure in this case invalidates the search and the arrest.

In this case the agents made an insufficient complaint, appropriated a warrant directed to the United States Marshal, ransacked the petitioner's premises upon the false representation that they had a search warrant, and then attempted to justify their procedure by affidavits that were perjurious according to the finding of the District Judge.

There is not a word of evidence in the record to suggest that a summary arrest without submission of the facts to a magistrate was necessary. The agents knew that the petitioners had been doing business at 200 Fifth Avenue for the preceding eighteen months.

Under such circumstances there was no necessity for the action pursued. In *Carroll* v. *United States*, 267 U. S. 132, 156, the Court said:

> "Such a rule fulfills the guaranty of the Fourth Amendment. *In cases where the securing of a warrant is reasonably practicable it must be used* and when properly supported by affidavit and issued after judicial approval protects the seizing officer against a suit for damages. In cases where seizure is impossible except without warrant the seizing officer acts unlawfully and at his peril unless he can show the probable cause."

It is true that the Court was here speaking of search warrants; but no reason appears why the same doctrine should not apply to arrests. The Fourth Amendment relates to both, and the Court in the *Carroll* case later

intimated that the rule does also apply to arrests. Thus the Court said further (267 U. S. 157):

> "The reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace (1 Stephen, History of Criminal Law 193), while the reason for arrest without warrant on a reliable report of felony was because the public safety and due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant."

Certainly no such reason existed in this case.

In *Henderson* v. *United States*, 12 Fed. (2d) 528, the Circuit Court of Appeals for the Fourth Circuit held that where securing of a warrant to arrest was reasonably practicable it must be done, and that an arrest and search executed without a warrant under such circumstances were invalid.

In that case an informer bought from Henderson a quantity of cocaine. The purchase had been arranged by agents, who were then waiting a short distance from defendant's premises. When the purchase was completed the informers came to the agents and reported what had happened.

> "The officers thereupon accompanied the informers to the store and admission was gained by the informers. The officers went into the store with them and notified the defendant that they were going to place him under arrest for the illegal sale of narcotics."

The informers identified Henderson and the agents demanded the right to search. This was refused. The

agents placed Henderson in custody and searched the premises, finding a can of cocaine and marked money. The Court of Appeals held the search unlawful and reversed Henderson's conviction for error in admitting in evidence the can of cocaine discovered at the time. The Court said:

> "It is admitted that the Government officers had no warrant either for the arrest of the defendant or for the search of his premises. There is no showing or contention that it was necessary to arrest defendant without a warrant to prevent his escape * * *."
>
> "It is argued that the officers had probable cause to believe that defendant had committed a felony and that they were therefore justified in arresting him without a warrant and in searching his premises as an incident to his lawful arrest."

The Court held that the search was the main object of the officers' conduct and proceeded to say:

> "The officers could not do indirectly what they could not do directly and certainly they could not nullify a constitutional provision against unreasonable searches and the Act of Congress making it a crime to search a private dwelling without warrant by the simple expedient of placing the defendant under arrest. The great bulwark of individual liberty incorporated in the Fourth Amendment would be but a mockery if petty officers of the Government were at liberty to disregard its provisions whenever, to procure evidence, they might see fit to arrest without a warrant upon a belief that a felony had been committed * * *. Can it be the law that an officer for the purpose of seeking evidence may invade the home of a citizen and search it without the oath or affirmation required by the Con-

> stitution and without having the question of probable cause determined by a judicial officer; upon merely deciding for himself that there is probable cause to believe that some person within the home is guilty of a felonious violation of a Revenue Act?"

A case in which the facts disclose a remarkable similarity to the present case is *United States* v. *McHie*, 194 Fed. 894.

In this case the defendants had been engaged in running an alleged bucket shop in alleged violation of Section 215 of the Criminal Code, a statute which provides that the use of the mails in a scheme to defraud shall be a felony. A special agent made a complaint alleging the existence of the scheme to defraud before a United States Commissioner, who thereupon issued a warrant for the arrest of the defendants. The agents, without securing the presence of any marshal or deputy marshal, or any persons authorized to serve a warrant or make a seizure, went to the premises of the defendants for the purpose of arresting the defendants and seizing the incriminating evidence. This was done and a large mass of books, papers, documents and other property was seized. Thereafter the defendants petitioned for a return of the property so seized and the petition was granted by the Court.

> "It would be exceedingly difficult under any circumstances to sustain the wholesale seizure and destruction of property shown in this case. The officers of the Government, deriving their authority from the Department of Justice, acted in a most unjust and unnecessarily lawless manner. Under no circumstances had they power to cut telegraph wires or break open a safe or vault. Nothing but a special order showing such

> a seizure as made it necessary to destroy property could have authorized it * * *. An arrest having been made without warrant because of the absence of a marshal or deputy, the seizures were unlawful on this ground * * *. It is, however, sought to justify the seizure on the ground that the persons arrested were found actually in the perpetration of a crime and could be arrested without warrant under the Illinois statute; and thus, the arrest being lawful, the seizure was also valid under the Dillon and Mills cases. *It is sufficient to say, in answer to this position, that the seizure was unreasonable, no matter what technical power may have been behind it.* Moreover, it would be a most surprising extension of the law of arrest without warrant, to justify the seizure of peaceful persons sitting quietly in their offices, on the ground that they were carrying on some business made criminal by such statute, or had formerly committed such an offense * * *. Such a doctrine has no foundation, either in reason or necessity, and is utterly opposed to the Fourth Amendment to the Constitution."

The rule permitting the arrest by private persons of those reasonably suspected of felony had its foundation in the days of summary execution and the rule of infangthief (1 *Stephen, History of Criminal Law*, 61), when the felon was an outlaw to be killed at sight.

At the present time Congress has set up magistrates to determine the existence of probable cause and marshals to execute warrants. The Courts have further held that it is not sufficient for an officer to make an affidavit that he has reason to believe and does believe that a certain defendant has violated a law. He must give the sources of his information.

Thus Mr. Justice Bradley of this Court said in *In re Rule of Court*, Fed. Cas. 12126:

> "I am informed by * * * the district judge * * * that great inconvenience is caused in this district by the arrest of persons charged with offenses against the revenue laws, against whom no sufficient evidence can be produced * * * whereby much useless expense is caused to the government and the personal liberty of the people is unnecessarily interfered with. One cause of this evil seems to be the fact that warrants are issued upon the affidavit of some officer, who upon the relation of others whose names are not disclosed, swears that, upon information he has reason to believe, and does believe, the person charged has committed the offense charged. * * * After an examination of the subject, we have come to the conclusion that such an affidavit does not meet the requirements of the constitution, which, by the fourth article of the amendments, declares that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and that no warrants shall issue but upon probable cause, supported by oath or affirmation describing the place to be searched and the persons to be seized. It is plain from this fundamental enunciation, as well as from the books of authority on criminal matters in the common law, that *the probable cause referred to, and which must be supported by oath or affirmation, must be submitted to the committing magistrate himself, and not merely to an official accuser, so that he, the magistrate, may exercise his own judgment on the sufficiency of the ground for believing the accused person guilty;* and this ground must amount to a probable cause of belief or suspicion

> of the party's guilt. In other words, the magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit or taken down by himself on a personal examination, exhibiting the facts on which the charge is based, and on which the belief or suspicion of guilt is founded."

This rule would be entirely avoided if the procedure followed in the present case is proper. And it is submitted, in the light of the *Carroll*, *Henderson* and *McHie* cases, that it is improper unless some emergency exists.

In this case petitioners were quietly in their offices. There was no reason to apprehend any difficulty in the execution of a warrant. The agents knew, as well as they knew anything about petitioners, that they had been occupying the same offices for the preceding eighteen months (fols. 97-126). There was no excuse for the failure to proceed in an orderly manner.

The District Judge disapproved the course pursued by the officers in this case, and stated that it would be most unfortunate should the practice be generally followed.

It is submitted that such disapproval will not be effective unless enforced by the rejection of evidence so secured.

POINT II.

The arrest of petitioners did not authorize a general exploratory search for incriminatory papers or the extortion of keys by threats of force for the purpose of searching locked desks and safes.

The Court of Appeals and the Government have relied principally on the case of *Marron* v. *United States*, 275 U. S. 192, as authority for holding that the general and exploratory search of petitioners' premises, the procuring the opening of locked desks and safes under threats of force, the search for and seizure of papers in these receptacles, to be lawful as an incident to the arrest of petitioners Gowen and Bartels.

The distinction which we desire to make between this case and the *Marron* case cannot be better expressed than in the following quotation from the brief submitted by the Government in opposition to Marron's petition for certiorari to the Circuit Court of Appeals for the Ninth Circuit. The purpose of the quoted matter was to distinguish between the *Marron* case and the case of *United States* v. *Kirschenblatt*, 16 Fed. (2d) 202. It is submitted that precisely the same distinction which was drawn in this quotation between the *Kirschenblatt* case and the *Marron* case also distinguishes the *Marron* case and this case. The quotation referred to is as follows (quoted from pages 10, 11 and 12 of Brief in Opposition, *Marron* v. *United States*) (italics are as in the original quotation; heavy black type is supplied by authors of present brief):

> "In that case (referring to the *Kirschenblatt* case, 16 Fed. [2d] 202) the record showed that

the agents ransacked defendant's entire premises and rummaged all through his private papers for incriminating evidence, for in the course of its opinion the Circuit Court of Appeals said (p. 203):

> 'While we agree that strict consistency might give to a search of the premises, incidental to arrest, the same scope as to a search of the person, it seems to us that that result would admit exactly the evils against which the Fourth Amendment is directed. Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they contain, *from ransacking his house for everything which may incriminate him,* once you have gained lawful entry, either by means of a search warrant or by his consent. * * *
>
> 'After arresting a man in his house, *to rummage at will among his papers in search of whatever will convict him,* appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate.'

"After pointing out that papers necessary to a criminal venture may be seized, the court proceeded (p. 204):

> 'Yet, if all records of the offender's doings, such as account books or customers' lists, are to be included, there would seem to be no escape from allowing a search at large through all his papers.
>
> 'It is seldom that one finds a document containing evidence of crime which was not at one time used in its commission; the papers important in any prosecution are ordinarily

> either communications passing between the actors or records necessary to keep track of the details. These are all that the prosecution requires, and all that, except in rare instances, it will ever get. They cannot be reached, *except by a thorough search of all that the offender has,* to allow which would be to countenance exactly what the amendment was designed to prevent. * * *
>
> 'The forged note, the fraudulent prospectus, the policy slip, the written contract, if that be forbidden, the seditious broadside—perhaps all these may be contraband and subject to seizure when found on the premises. But the whole of a man's correspondence, his books of account, the record of his business, in general, the sum of his documentary property—these, in our judgment, are as inviolate upon his arrest as they certainly are upon search warrant.'

"There are statements in that opinion which indicate that the court believed that the only incriminating papers (not contraband or instruments of the crime) which may be seized as incident to a lawful arrest are those found on the person of the man arrested, **but the record in that case showed that to disclose the incriminating documents the officers ransacked the premises in a high-handed way, not to discover contraband articles described in the warrant but merely to obtain incriminating documents, and it was for this reason that the United States made no application for certiorari to review that decision.**

"There was in the instant case no rummaging among defendant's papers for incriminating evidence.

> "Whether a search and seizure are reasonable must depend upon the facts in each particular case. At the time of the seizure in the instant case the officers were engaged in the execution of a valid warrant directing the search of the premises for intoxicating liquor and property designed for its manufacture. They had no warrant for the seizure of papers *nor was any general search made therefor.* The documents seized were *incidentally discovered* while the officers were searching for liquor."

And in its brief on argument the Government pursued the same distinction. For instance it presented with some emphasis the case of *State* v. *Mausert*, 88 N. J. L. 286. In this case the hotel register of an alleged disorderly house had been seized at the time of an arrest. The seizure was sustained but the Court said:

> *"It is not a case where papers were secreted and intended to be kept private* nor of requiring the production of papers of like character, but rather the taking of evidence of a crime then being committed, in the commission of which the books were a useful element. There was no unreasonable search and seizure within the constitutional prohibition."

The general search that took place in the *Kirschenblatt* case, so aptly described by the Government in the brief quoted from, is precisely what took place in this case, plus the aggravated features of the lack of a warrant, the deceitful claim of possession of a search warrant, the threat of force to obtain the opening of desks and safes, and the making of false affidavits to sustain the seizure.

It is submitted that there is nothing in the opinion of the *Marron* case to indicate that the Court intended to overrule the celebrated case of *Boyd* v. *United States*, 116 U. S. 616, and that the general and exploratory search for incriminating papers undertaken in this case cannot be reconciled with the doctrine of the *Boyd* case. The *Boyd* case interpreted the Fourth Amendment as forbidding *general* searches for incriminating papers *under any circumstances*. The Court said:

> "The search for and seizure of stolen or forfeited goods or goods liable to duties and concealed to avoid the payment thereof are totally different things *from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him.* The two things differ *toto coelo*. In the one case, the Government is entitled to the possession of the property, in the other it is not. * * *
>
> "In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history or the controversies on the subject, both in this country and in England. The practice had obtained in the Colonies, of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book'; since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was

> perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.' "

The Court then discussed with the greatest approval and praise the case of *Entick* v. *Carrington*, 19 Howell St. Tr. 1029.

The Court stated that abuses at that time had crept into the administration of public affairs, and continued:

> "Prominent and principal among these was the practice of issuing general warrants by the Secretary of State, for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel. * * * By authority of the secretary's warrant Wilkes' house was searched, and his papers were **indiscriminately** seized."

The Court then quoted from Lord Camden's opinion in *Entick* v. *Carrington*, as follows:

> "The case of searching for stolen goods crept into the law by imperceptible practice. No less a person than my *Lord* Coke denied its legality (4 Inst. 176) and, therefore, if the two cases (the search for stolen goods and the search for incriminatory papers) resemble each other more than they do, we have no right, without an Act of Parliament, to adopt a new practice in the criminal law, *which was never yet allowed from all antiquity*. Observe, too, the caution with which the law proceeds in this singular case (search for stolen goods). There must be a full charge upon oath of a theft committed. The

owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant, to show them to the officer, who must see that they answer the description. * * *

"If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case (case of search for papers) protect the subject by adding proper checks; would require proofs beforehand; would call up the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy, my answer is that all these precautions would have been long since established by law, if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing * * *.

"Lastly it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. * * * In the criminal law such a proceeding was never heard of; and yet there are some crimes, such, for instance as murder, rape, robbery and house breaking, to say nothing of forgery and perjury, that are more atrocious than libeling. *But our law has provided* ***no paper search*** *in these cases to help forward the conviction* * * *."

The Court declared that the case of *Entick* v. *Carrington,* was a landmark of English liberty and that it had been the intention of the First Congress to write the principles of this case into the Constitution. The Court concluded *that general searches for papers were forbidden.*

The doctrine of the *Boyd* case has been often approved by this Court and has been followed in a series of cases. *Weeks* v. *United States,* 232 U. S. 383; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385; *Gouled* v. *United States,* 255 U. S. 298. In *Carroll* v. *United States,* 267 U. S. 132, the Court quoted the passage from the *Boyd* case relating to the distinction between the search for stolen goods and the search for papers that has been set forth above, and described the passage as one of "particular significance" (*267* U. S. 149).

Can this historic policy against general and exploratory searches and seizures for incriminating documents said to be subject to the proviso that if an informer and accomplice tells an officer that certain persons are violating the law, and this officer tells another, the latter may proceed to a general and exploratory search of the alleged offenders' premises and papers whenever he may find them at home?

As the Court said in the *Kirschenblatt* case:

> "After arresting a man in his house, to rummage at will through his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home."

The general search as incident to an arrest is also subject to the same criticisms that Otis made against general warrants:

1. It may be made by a private person.

2. There is no return.

1. In his argument to the Justices of the Superior Court of the Province of Massachusetts Bay in *Paxton's Case*,* in February, 1761 (which is referred to in the *Boyd* case, 116 U. S. 625), Otis said in part (2, Works of John Adams, 524):

> "But to show another absurdity in this writ; if it should be established, I insist upon it, every person by the 14 Charles II† has this power as well as custom-house officers. The words are, 'It shall be lawful for any person or persons authorized,' etc. What a scene does this open! Every man, prompted by revenge, ill humor, or wantonness, to inspect the inside of his neighbor's house, may get a writ of assistance. Others will ask for it from self-defense; one arbitrary exertion will provoke another, until society be involved in tumult and blood."

Thus, if decision sought to be reviewed be correct, any man can explore his neighbor's house, provided someone will tell him, that someone else told him, that the neighbor has violated the liquor laws (practically all liquor law offenses now being punishable by prison terms in excess of one year).

The possibilities of such a rule are extraordinary.

---

* Paxton was Surveyor of the Port of Boston. He applied for a writ of assistance. A group of Boston merchants were allowed to intervene, and oppose, by counsel, the issuance of the writ.

† The statute authorizing writs of assistance.

2. In the same argument Otis said (2, Works of John Adams, 524-525):

> "Again these writs are not returned. Writs in their nature are temporary things. When the purposes for which they are issued are answered, they exist no more; but these live forever; no one can be called to again."

In this case a great mass of papers were taken from petitioners. There has been no return on any writ, because none was issued. No receipt was given. The safeguards thrown about search warrants by Congress do not exist as to these cases.

These conclusions seem unavoidable:

1. The Fourth Amendment was intended to forbid general exploratory searches for incriminatory papers under any circumstances.

2. The effect of the decision below will be to permit general exploratory searches for incriminatory documents by private persons who have hearsay information that the person whose premises are to be searched has violated the liquor laws, when that person is at home.

We have already quoted the elaborate statement made by the Government in the *Marron* case in arguing that that case did not involve a *general* search for incriminatory papers, and stating that no application had been made to review the *Kirschenblatt* case because the latter *had involved a general search for incriminatory papers.* That this Court appreciated the distinction is indicated by its statement in the *Marron* opinion:

"General searches have long been deemed to violate fundamental rights. It is plain that the Amendment forbids them" (275 U. S. 195). Furthermore the cases cited by this Court in that part of its opinion sustaining the seizure in that case were the *Kirschenblatt* case itself; *Kirvin* v. *United States*, 5 Fed. (2d) 282, another case in which the Second Circuit Court of Appeals declared that no general search for papers could be made as an incident to an arrest; and *Sayers* v. *United States*, 2 Fed. (2d) 146, a Ninth Circuit Court of Appeals case sustaining a seizure of liquor.

Hence it is submitted that the *Marron* case does not require that the second proposition above stated be accepted, and that the seizure in this case, under the doctrine of the *Boyd* case, was unconstitutional.

It is submitted that the decision of the lower courts in this case is an encroachment on the right of the citizen guaranteed by the Fourth Amendment, the kind of encroachment warned against in the *Boyd* and *Byars* cases, and that the decision of the Court below should be reviewed and reversed.

POINT III.

The writ of certiorari should issue.

Respectfully submitted,

CHARLES DICKERMAN WILLIAMS,
J. EDWARD LUMBARD, JR.,
SEYMOUR B. QUEL,
Counsel for Petitioners.

New York City, N. Y., May, 1930.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 111

GO-BART IMPORTING COMPANY, INC., PHILIP D. GOWEN, AND WILLIAM BARTELS, PETITIONERS,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MEMORANDUM IN OPPOSITION TO MOTION TO ADVANCE.

E. F. COLLADAY,
Attorney for Petitioners.

J. EDWARD LUMBARD,
Of Counsel.

IN THE

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MEMORANDUM IN OPPOSITION TO MOTION TO ADVANCE.

Now come the petitioners, by their attorney, and, by leave of court first had and obtained, file this memo-

randum in opposition to the Motion to Advance filed herein on October 6th, 1930.

This case involves an arrest and search and seizure by Federal Agents improperly having in their possession warrants addressed not to them but to the United States Marshal, which are conceded to have been defective and the attempt is now being made to justify the procedure followed by the agents, notwithstanding the defective warrant, on the ground that, at the time of the arrest, search and seizure, they had information in their possession indicating that a felony had been committed.

The Federal agents contended that they did not use the warrants in making the arrest and they executed and filed sworn affidavits to this effect, notwithstanding which affidavits the Trial Court found that the warrants were used, and, in the course of its opinion, said:

> "Indeed, it is insisted by the Government that no use was made of the warrant at the time of the arrest, and that Agent O'Brien only took the papers with him 'for the purpose of reference as to the addresses of the various defendants.' This, however, is contradicted by the defendants Gowen and Bartels, who state in their moving affidavits that Agent O'Brien described the papers to them at the time of the arrest as 'search warrants', and exhibited them to justify the demand for a search of the offices. On that issue, I am inclined to accept the story of the defendants, as I do not think it is at all reasonable to suppose that the prohibition agents did not make some use of the warrant

> when challenged to show the authority under which they were proceeding in making the arrests. And I am satisfied they were challenged to show their authority, as arrests and seizures of the kind described in these papers are not ordinarily made without some demand for credentials."

In its memorandum opinion, the Court further said:

> "In disposing of this motion as above indicated, I do not wish to be understood as approving the practice followed by the Government in making these arrests. I can see no adequate reason why arrests of this kind should not be made by the United States Marshal under valid warrants issued in advance, and I think it would be most unfortunate if any other practice should be generally followed."

The Government's attempt to justify the arrest and search and seizure without a warrant, on the ground that probable cause existed, is met by a record which clearly establishes that such information as was in the possession of the agents was not the personal knowledge of the agents making the arrest but, on the contrary, merely information furnished by others through an intermediary, so that, reduced to its final analysis, this case marks an effort to have this Court sanction an arrest and search and seizure made without a warrant and based upon third-hand hearsay evidence.

It is an established principle that the agents who made the arrest possessed no greater authority than that of a private person making an arrest without a

warrant, and it is inconceivable that an arrest by a private person under such circumstances would be tolerated by this Court.

At the time the Government agents entered the premises, one of the petitioners and an employee were pacefully sitting in their offices, when, without justification or excuse, the Government officers entered the same, ransacking the premises upon the false representation that they had a search warrant, and then attempted to justify their procedure by affidavits which were perjurious according to the finding of the District Judge.

The arrest was made on June 6, 1929 and an indictment was not returned until December 20, 1929. It is submitted that no facts have been presented justifying the granting of the Respondent's Motion to Advance but that the cause should take its place in the proper order and be argued when it is reached. The record discloses that no haste has been shown by the Government heretofore, except the haste of the Government agents when making the arrest, without a proper warrant, and it is difficult to comprehend any ground for haste now.

Respectfully submitted,

E. F. COLLADAY,
Attorney for Petitioners.

J. EDWARD LUMBARD,
Of Counsel.

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BRIEF FOR PETITIONERS.

EDWARD F. COLLADAY,
Attorney for Petitioners.

[redacted].

BENJAMIN B. PETTUS,
JOSEPH C. McGARRAGHY,
Of Counsel.

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v.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

Opinions of the Courts Below.

The opinion of the District Court for the Southern District of New York, dated December 9, 1929 (R.

54-57), is not reported. The order of Coxe, J., denying motion for the return of certain papers and documents to the petitioners herein, and motion to re-argue was entered December 27, 1929 (R. 63). This order was affirmed in part and modified in part by the Circuit Court of Appeals for the Second Circuit by opinion of Swan, J., April 14, 1930 (R. 69-79). This decision is reported in 40 Fed. (2d) 593.

Jurisdiction.

The decree of the Circuit Court of Appeals to be reviewed was entered on April 15, 1930 (R. 79). Petition for certiorari was filed May 12, 1930, and certiorari was granted June 2, 1930 (R. 80) (281 U. S. 719). The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936).

Questions Presented.

Whether petitioners are entitled to the return of documents alleged to have been illegally seized as an incident to the arrest of petitioners Gowen and Bartels, the two principal officers of petitioner Go-Bart Importing Company, Inc., and to the suppression of such documents as evidence. This question in turn involves the further questions—

(*a*) Whether the arrest was valid.

(*b*) Whether under any circumstances the ransacking of desks and safes in a general and exploratory search for incriminating papers is justified as an incident of an arrest.

(*c*) Whether in the absence of a crime being committed books and papers not forming the instruments of crime may be seized without a search warrant.

Statement of Facts.

On June 6, 1929 (R. 55), Eugene O'Brien, an agent of the Prohibition Bureau, accompanied by two other Prohibition agents, went to the offices of petitioner Go-Bart Importing Co. at 200 Fifth Avenue, New York City, bearing a certified copy of a warrant for the arrest of petitioners Philip D. Gowen, William Bartels and thirty-three others. The warrant was addressed to the United States Marshal for the Southern District of New York and his deputies, and charged the persons to be arrested with conspiracy to violate the National Prohibition Act (R. 18). The Prohibition agents were not accompanied by the marshal or any of his deputies (R. 15).

Petitioner Bartels, Secretary of the Go-Bart Importing Co. and one George Heath named in the warrant, an employee, were peacefully sitting in the offices at the time of the entry of the agents (R. 13, 14).

When requested to state their business, the agents exhibited a document which they claimed to be a search warrant authorizing a search of the premises (R. 8, 13), which appears to have been the warrant of arrest referred to above.

Shortly thereafter Petitioner Gowen, president of the company, entered the premises (R. 3) and O'Brien exhibited this paper to him, again claiming it to be a search warrant (R. 3). Petitioners Gowen and Bartels and employees Heath and one Gardiner

were arrested after the search say the petitioners (R. 14), before the search say the agents (R. 32).

The agents took from Gowen's person some keys, and under threat of breaking into his desk and safe forced Gowen to open them. The desk and safe were then searched and from them the agents took certain papers, documents and property, including journals, insurance policies, cancelled checks, index cards and other miscellaneous property. The agents rummaged at will through the other desks belonging to the company, taking therefrom papers of the same nature (R. 4, 9, 14). No receipts were given for the articles taken (R. 4, 9, 14).

The warrant in question was issued by United States Commissioner Garrett W. Cotter on June 5, 1929 (R. 18) based on a complaint sworn to by William J. Calhoun, Special Agent in Charge, Bureau of Prohibition, New York City (R. 19), alleging on "information and belief" that between January 1, 1929, and June 5, 1929, the parties named, including petitioners Gowen and Bartels and thirty-three others did illegally conspire to commit a nuisance against the United States by transporting, selling, dealing in, etc. intoxicating liquors in violation of the National Prohibition Act (R. 20). The only overt act alleged is the purchase on May 23, 1929, by defendant George Heath of one Peerless automobile (R. 21).

This complaint it is now conceded was insufficient and totally invalid (R. 55).

Petitioners Gowen and Bartels were arraigned before Commissioner Cotter on a complaint of conspiracy

(R. 14). There has been no hearing on this complaint (R. 60).

After the proceedings herein were commenced, the prohibition agents attempted to justify their procedure by asserting that one Braidwood, an informer and alleged accomplice of petitioners, not a Government employee, had told Agent Calhoun, who in turn had told Agent O'Brien, that petitioners bought and sold liquor in violation of the prohibition law (R. 28-30). An elaborate affidavit was submitted by Braidwood in this proceeding alleging facts tending to show petitioners guilty of such crime during a period prior to that set forth in the complaint of Agent Calhoun (R. 21-28). Calhoun's affidavit stated he had independently investigated Braidwood's information and found it to be true, but that "the sources of these independent investigations conducted by deponent cannot be disclosed consistently with public justice" (R. 29). Calhoun's affidavit further stated he had assigned Agent O'Brien to further investigate the case (R. 30).

O'Brien's affidavit admitted that he had made no independent investigation and had relied upon the statements made to him by Agent Calhoun (R. 32). Both O'Brien and the two officers accompanying him made affidavits in which they denied that they had made the arrests and conducted the search upon the assumed authority of the warrant (R. 32, 51, 53).

District Judge Coxe held this denial false in the following language (R. 55):

> "Indeed, it is insisted by the Government that no use was made of the warrant at the time of

> the arrest, and that Agent O'Brien only took the papers with him 'for the purpose of reference as to the addresses of the various defendants.' This, however, is contradicted by the defendants Gowen and Bartels, who state in their moving affidavits that Agent O'Brien described the papers to them at the time of the arrest as 'search warrants', and exhibited them to justify the demand for a search of the offices. On that issue, I am inclined to accept the story of the defendants, as I do not think it is at all reasonable to suppose that the prohibition agents did not make some use of the warrant when challenged to show the authority under which they were proceeding in making the arrests. And I am satisfied they were challenged to show their authority, as arrests and seizures of the kind described in these papers are not ordinarily made without some demand for credentials."

Judge Coxe, however, denied the relief sought on the ground that the agents had reasonable cause to believe the petitioners guilty of a felony; that the arrest was therefore valid; and that the search was valid as an incident to such arrest.

But Judge Coxe said (R. 57):

> "In disposing of this motion as above indicated, I do not wish to be understood as approving the practice followed by the Government in making these arrests. I can see no adequate reason why arrests of this kind should not be made by the United States Marshal under valid warrants issued in advance, and I think it would be most unfortunate if any other practice should be generally followed."

The order of the District Court was affirmed by the Circuit Court of Appeals except in one respect (not material here), as to which it modified the order (R. 79).

Specification of Errors to Be Urged.

1. The Circuit Court of Appeals erred in affirming the order of the court below denying the motion for the return of the books and papers and the suppression of the same as evidence.

2. The Circuit Court of Appeals erred in holding that the arrests were legal.

3. The Circuit Court of Appeals erred in holding that the arresting officers acted upon reasonable and probable cause in making the arrests when the information of the officers was admittedly obtained from others and not the result of their own investigation.

4. The Circuit Court of Appeals erred in sustaining the legality of the search and seizure made herein.

5. The Circuit Court of Appeals erred in holding that there is no distinction between the seizure of papers and documents that are incriminatory evidence of a crime and those which are the means by which it is carried on.

6. The Circuit Court of Appeals erred in sustaining a general and exploratory search of premises occupied as an office by petitioners, without the authority of a search warrant and in the absence of evidence of crime being committed therein.

SUMMARY OF ARGUMENT.

The points to be argued herein are:

I. The arrest of petitioners was illegal.

(*a*) The warrant of arrest was based upon an insufficient complaint.

(*b*) Even assuming the warrant of arrest to have been properly issued, the arrest under it was nevertheless invalid because it was not executed by a United States Marshal or one of his deputies.

(*c*) No felony or misdemeanor had been committed or carried on in the presence of the officers.

(*d*) The officers had no reasonable grounds for believing that a felony had been committed.

(*e*) Reasonable or probable cause does not exist where the officer obtained his information solely from a superior officer who in turn obtained it from the unsworn statement of another.

(*f*) Probable cause which is insufficient as the basis for a warrant of arrest is insufficient to justify an arrest without a warrant.

II. The search and seizure of petitioners' books and papers was an "Unreasonable search and seizure" in violation of the Fourth and Fifth Amendments.

(*a*) A general and exploratory search of the office of petitioners in which they were arrested, made without the authority of a search warrant, is illegal.

(*b*) The seizure of books and papers located on premises where an arrest is made is illegal where the

books and papers are not the means or fruits of the crime but are merely private papers of the petitioners.

(*c*) A search to secure evidence to be used against defendants in a criminal proceeding is within the constitutional prohibition.

(*d*) An unlawful search and seizure may not be justified by what is found.

III. The books and papers seized should be returned to petitioners and the evidence obtained through the seizure should be suppressed.

FIRST POINT

THE ARREST OF PETITIONERS WAS ILLEGAL.

(*a*) *The warrant of arrest was based upon an insufficient complaint.*

The validity of the arrest in this case cannot be sustained by reason of the warrant issued for the arrest of the petitioners Gowen and Bartels. That warrant was improperly issued in violation of the Fourth Amendment to the Constitution which reads as follows:

> "* * * no warrants shall issue, but upon probable cause, supported by oath or affirmation. * * *."

It also violated the requirements of the New York Code of Criminal Procedure, which provides:

> "Sec. 148. When an information is laid before a magistrate, of the commission of a crime,

> he must examine on oath the informant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.
>
> "Sec. 149. The depositions must set forth the facts stated by the prosecutor and his witnesses, tending to establish the commission of the crime and the guilt of the defendant."

The mode of procedure under the New York law is made applicable here by reason of Section 591 of Title 18 U. S. Code Annotated (formerly Rev. Stat. Sec. 1014).

The complaint of William J. Calhoun does nothing more than state (R. 20):

> "* * * upon information and belief * * *. That * * * beginning on January 1, 1929, and continuing on each and every day thereafter down to and including the date of the filing of this complaint * * * Philip D. Gowen * * * William Bartels * * * did * * * conspire * * * to commit a nuisance against the United States, that is to say, to unlawfully, willingly, and knowingly possess, import, export, transport, barter, sell, furnish, deliver, solicit, and receive orders for intoxicating liquor * * * in violation of * * * the National Prohibition Act * * *."

The complaint concludes with the recital of one overt act, namely, the purchase by one of the defendants of one Peerless automobile.

It is to be noted that the complaint does not even state a crime inasmuch as there is no such crime as committing a nuisance against the United States. The National Prohibition Act makes the *maintaining* of a nuisance, which is defined as a place where intoxicating liquors are "manufactured, sold, kept or bartered" (Sec. 33 of Title 27, U. S. C. A.) a crime. It is clear, however, that the complaint does not charge the commission of that crime and that Calhoun did not mean to charge the commission of that crime but probably meant to charge the commission of a conspiracy to commit an offense against the United States in violation of Section 88 of Title 18 of U. S. C. A., Sec. 37 of U. S. C. C.

However, quite apart from the fatal defect in failing to charge a crime, the complaint is also bad because it was made solely on information and belief, did not set forth the source of the affiant's information and belief, and stated no facts tending to show the commission of a crime by the defendants.

This Court passed on the question in *Ex parte Burford*, 7 U. S. (3 Cranch.) 448, decided in 1806, and in an opinion written by Chief Justice Marshall, held that a warrant of arrest issued upon an affidavit based upon "the information, testimony and complaint of many credible persons" was illegal "for want of stating some good cause certain, supported by oath."

Later in *Rice v. Ames*, 180 U. S. 371 (1901), the question arose in an extradition proceeding where the validity of the complaint was tested by habeas corpus.

Mr. Justice Brown, speaking for the unanimous Court, said:

> "The first two complaints, which were dismissed, as well as the first count of the complaint under which the proceedings were finally had, were obviously insufficient, since the charges were made solely upon information and belief, and no attempt was made even to set forth the sources of information or the grounds of affiant's belief. This is bad, even in extradition proceedings, which are entitled to as much liberality of construction in furtherance of the objects of the treaty as is possible in cases of a criminal nature. * * *
>
> "A citizen ought not to be deprived of his personal liberty upon an allegation which, upon being sifted, may amount to nothing more than a suspicion."

The leading case of the Second Circuit is *U. S. v. Ruroede*, 220 Fed. 210 (1915), in which case the complaint alleged, upon information and belief, that the defendants conspired to defraud the United States, and that the defendant Ruroede had an interview with another defendant on a certain date. The complaint further stated that the source of complainant's information and the grounds for his belief were based upon an official investigation; a statement which is at least more than is contained in Calhoun's complaint in the case at bar. It did not state any further facts as to the information and belief and how it was secured.

The opinion of the Court at page 213 contained the following statement:

> "While the government in any case is justified as far as possible in keeping secret its evidence until a matter has been submitted to the grand jury, it cannot, I think, sustain a warrant of arrest for any reason or under any circumstances, where neither the warrant nor the complaint state facts constituting the crime that is charged, even though the prisoner has at the hearing waived examination."

In the very recent case of *United States ex rel. King v. Gokey*, 32 Fed. (2d) 793 (1929 D. C. N. D. N. Y.), the precise point was discussed by District Judge Bryant in the following language:

> "If the complaint is made on information and belief, it must give the grounds of belief and sources of information. A complaint not based upon the complainant's personal knowledge, and unsupported by other proof, confers no jurisdiction upon the commissioner to issue a warrant."

Citing:

United States v. Baumert, 179 Fed. 735.
United States v. Wells, 225 Fed. 320.
United States v. Ruroede, 220 Fed. 210.
In re Blum, 30 N. Y. S. 396.

Agent Calhoun's affidavit fails to state a single fact except that one of the defendants bought a Peerless automobile. Clearly this is not a sufficient compliance with the standard laid down by the cases.

This Court held in *Byars v. United States*, 273 U. S. 28, that a search warrant based upon an affidavit

which stated only that the affiant had good reason to believe and did believe that the defendant had in his possession intoxicating liquors, instruments and materials, was clearly bad as tested by the Fourth Amendment and the Espionage Act.

(*b*) *Even assuming the warrant of arrest to have been properly issued, the arrest under it was nevertheless invalid because it was not executed by a United States Marshal or one of his deputies.*

The warrant in this case was directed "To the Marshal of the United States for the Southern District of New York and to his deputies or any or either of them." (R. 18.) It contained no direction to anyone else and it conferred no authority on the Prohibition Agents who used it as their authority for the arrest and search.

This question has arisen in the Federal courts on numerous occasions where it has been held that a warrant must be strictly construed and that it confers authority for its execution only upon the persons to whom it is directed.

A case directly in point is *United States v. McHie*, 194 Fed. 894. In that case a petition was made for the return of papers seized incidental to an arrest. A warrant had been issued to the United States Marshal and his deputies on the affidavit and complaint of one "S", special agent of the Department of Justice, for the arrest of the defendant and others. "S" and other special agents took the warrant and made arrests and also made incidental searches and seizures. Many of the facts in that case are strikingly similar

to the facts in the case at bar. The crime charged was a felony, using the mails to defraud. Later the marshal, after some persuasion, agreed to file a return of the warrant. The Court, in holding that the arrest was illegal, said:

> "The officers of the government, deriving their authority from the Department of Justice, acted in a most unjust and unnecessarily lawless manner. * * * They did not even insure the presence of the marshal, although making an entirely extravagant and wholly unnecessary show of force. * * * Even in such desperate cases as counterfeiting, the rules of the Secretary of the Treasury expressly deprecate arrests without warrant, and prohibit searches and seizures without a search warrant, except in cases of arrest. Secret Service Rules, Arts. 3, 9.
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> * * * * * * *
>
> The arrest having been made without warrant because of the absence of a marshal or deputy, the seizures were unlawful on this ground."

In *Shephard v. Adams* (1898), 168 U. S. 618, Mr. Justice Shiras, speaking for the majority of the court, said at page 624:

> "All writs and processes issuing from a Federal court must be under the seal of the court and signed by the clerk, and bear teste of the judge of the court from which they issue. Sec. 911, Revised Statutes. The processes and writs must be served by the marshal or by his regularly appointed deputies. Secs. 787 and 788, Revised Statutes."

In *Perry v. United States* (1926 C. C. A. 9), 14 Fed. (2d) 88, the Circuit Court of Appeals for the Ninth Circuit reversed a judgment of conviction for violation of the National Prohibition Act on the ground that the lower court had admitted in evidence certain papers and documents seized under a search warrant directed to "The Federal Prohibition Director in and for the State of California and to his assistants, agents, and inspectors and any or either of them" and the warrant had been executed by a general prohibition agent who was not within the above category. In rendering its opinion the court said:

> "We, therefore hold that the direction in the search warrant was an essential part of it, and that because the plain language of the statute was disregarded, not alone in respect to the direction to those officers who were authorized to serve, but also in respect to those who did serve it, the objections to the warrant and to the use of the evidence obtained and the search were well taken and should have been sustained. *United States v. Dziadus*, 289 Fed. 837; *United States v. Innelli*, 286 Fed. 731."

In *United States v. Mitchell* (1915), 223 Fed. 805, the rule was clearly stated by the District Court for the Eastern District of New York, as follows:

> "If the marshal is commanded by the writ to serve it, no other person may perform that duty, although the State law may authorize such service by a private person. (*Schwabacker v. Reilly*, 2 Dill. 127, Fed. Cas. No. 12,501.)"

In the case at bar, the District Court in its opinion held (R. 55):

> "It is conceded that the warrant of arrest, addressed to the marshal of the district, could not be executed by prohibition agents even though acting on official business. It is not disputed, either, that the warrant was invalid in that the complaint was palpably insufficient, and no attempt is made by the Government to justify the seizure on the basis of the warrant."

And the District Judge, even though denying the motion of the petitioners for the return of the seized property felt constrained to conclude his opinion as follows (R. 57):

> "In disposing of this motion, as above indicated, I do not wish to be understood as approving the practice followed by the Government in making these arrests. I can see no adequate reason why arrests of this kind should not be made by the United States Marshal under valid warrants issued in advance, and I think it would be most unfortunate if any other practice should be generally followed."

(c) *No felony or misdemeanor had been committed or carried on in the presence of the officers.*

The Government concedes that the warrant of arrest was based upon an insufficient complaint and was addressed to the marshal instead of to the prohibition agent and now contends that this did not invalidate seizure as an incident to arrest on the ground that the arrest was one that could lawfully be made without a warrant. (R. 15, 86).

No offense was committed in the presence of the officers who made the arrest in the case at bar. Nothing appears to indicate that lawful grounds existed for suspecting a violation of the law occurring in the offices of petitioners.

The situation in the case at bar is similar to that in *United States v. McIlie, supra.* There a special agent of the Department of Justice attempted to execute warrants of arrest addressed to the United States Marshal. He entered a business office and made arrests under these warrants. As in the case at bar, the Government sought to sustain the arrests on the ground that an arrest without a warrant could be made under State statutes. This contention the Court overruled, saying:

> "It is, however, sought to justify the seizure on the ground that the persons arrested were found actually in the perpetration of a crime, and could be arrested without warrant, under the Illinois statute; and thus, the arrest being lawful, the seizure was also valid under the Dillon and Mills cases. It is sufficient to say, in answer to this position, that the seizure was unreasonable, no matter what technical power may have been behind it. Moreover, *it would be a most surprising extension of the law of arrest without warrant to justify the seizure of peaceable persons, sitting quietly in their offices, on the ground that they were carrying on some business made criminal by some statute, or had formerly committed such an offense.* On this theory, all the officers, agents, and servants of the American Tobacco Company, for example,

> would have been subject to arrest without warrant by anyone, officer or layman, because they were prosecuting an unlawful combination. Such a doctrine has no foundation, either in reason or necessity, and is utterly opposed to the Fourth Amendment to the Constitution." (Italics supplied.)

By Section 2, Title II of the National Prohibition Act, (27 U. S. C. A. Sec. 11), prohibition officers are given the power of swearing out warrants. By Section 25 (27 U. S. C. A. Sec. 39) they are empowered to execute search warrants. By Section 26 (27 U. S. C. A. Sec. 40) they are directed to seize all vehicles on land or water which they "discover" to be carrying liquor and arrest the person in charge.

In *United States v. Di Corvo*, 37 Fed. (2d) 124 (D. C. Conn.), Judge Thomas discussed very fully the powers of prohibition agents to make arrests without warrant. He said (p. 128):

> "A search of the statutes, however, fails to reveal the grant of any such general police power to prohibition agents. The scope of their power to search and arrest is determined by sections 2, 25 and 26 of title 2 of the National Prohibition Act (27 U. S. C. A. Secs. 11, 39, 40). In none of these sections are prohibition agents vested with the general powers of a peace officer.
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> * * * * * * *
>
> "Prohibition agents are to investigate and report violations of the Prohibition Act to the United States Attorney who is charged with the

> duty of prosecution. They may swear out warrants for the apprehension of offenders. Section 1014 of the Revised Statutes (18 U. S. C. A., Sec. 591) is made applicable. That section, instead of making provision for arrest without a warrant, empowers local magistrates to apprehend offenders against the Federal laws, and adopts the State practice in the matter of issuing and executing criminal process. The whole section is fraught with the presupposition that arrests are to be made only upon judicial process.
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> . . . . . .
>
> "*Title* 2, *Sec.* 26 (27 *U. S. C. A. Sec.* 40) *is the only section granting the right to prohibition agents to effect an arrest without process.* But that section is limited to cases where the agent discovers the person in the act of transporting intoxicating liquor and, in the instant case, no such fact appears." (Italics supplied.)

It was, therefore, held that the search and seizure without a warrant was illegal and the evidence obtained was suppressed.

Counsel has found no case holding, even by implication, that a prohibition agent has the power to arrest for a felony not committed in his presence. The furthest that the cases go is to hold that an agent of the Commissioner of Internal Revenue may arrest for a crime, either for a felony or misdemeanor, when the crime is committed in his presence. This was the holding in *Rouda v. United States* (1926, C. C. A. 2d), 10 Fed. (2d) 916.

In *United States v. Rembert*, 284 Fed. 996, 1006 (1922 D. C. Texas), the court said:

> "An offense occurs in the presence of an officer and a discovery may be said to have been made by the * * * officers when the evidence of their senses induces them to believe upon reasonable grounds for belief that an offense is being committed."

We submit that by no use of the officers' five senses in the case at bar could they have had grounds for belief that the crime of conspiracy was being committed by petitioners at the time of their arrest.

(d) The officers had no reasonable grounds for believing that a felony had been committed.

"Probable cause" is defined in *Carroll v. United States*, 267 U. S. 132, 161, where the court quotes with approval from *Stacey v. Emery*, 97 U. S. 642, 645, as follows:

> "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing the offense has been committed, it is sufficient."

In *Dumbra v. United States*, 268 U. S. 435, 441, this court said:

> "In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. We are concerned only with the question whether the affiant had reasonable grounds at

> the time of his affidavit and issuance of the warrant for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant."

The courts below sustained the validity of the arrests without a valid warrant in the case at bar upon the principle that the person making the arrest had probable cause for believing the person arrested guilty of the crime charged, and cited in support of this doctrine a number of cases, all of which with one exception involved instances where the officers arrested upon the evidence of their senses, that is in all of which they were made aware by the sense of sight or smell that a crime was being committed in their presence. These decisions cited by the courts below are:

Lee Kwong Nom v. United States, 20 Fed. (2d) 470.
Vachina v. United States, 283 Fed. 35.
Dowling v. Collins, 10 Fed. (2d) 62.
Brady v. United States, 300 Fed. 540.
King v. United States, 1 Fed. (2d) 931.
White v. United States, 16 Fed. (2d) 870.
Prichett v. Sullivan, 182 Fed. 480, 482.
United States v. Rembert, 284 Fed. 996.
Stallings v. Splain, 253 U. S. 339, 342.

The one exception to the rule referred to above is Stallings *v.* Splain, *supra*, which involved an extradi-

tion and in which this Court following Rice *v.* Ames, 180 U. S. 371, also cited above, held that the utmost liberality of construction is to be given extradition cases.

The case at bar differs from the cases cited in that here there is no claim that a crime was being committed in the presence of the officers when they entered the suite at 200 Fifth Avenue. If any such claim were made it would be contrary to fact and reason. In this case also the validity of the arrests cannot rest upon anything seen, heard or smelled by the agents at the time they entered the premises to make the arrests, but must rest entirely upon what Agent O'Brien knew before he went to the premises on June 6, 1929.

In October, 1929, over four months after the arrests in question, Agent O'Brien made an affidavit (R. 30) in which he claimed that, prior to the arrests, Agent Calhoun had related to him information which had been related to Calhoun by Braidwood as contained in Braidwood's affidavit (R. 21) also made in October, 1929, four months after the arrest. Agent Calhoun made affidavit (R. 28) also in October, 1929, that, prior to the arrests, Braidwood had related to him the facts contained in the Braidwood affidavit. Therefore, *to sustain this arrest it must be held that O'Brien, possessing no greater power than that of a private citizen, had a right to arrest upon the unsworn statements of another private citizen, not even made directly to the arresting citizen, but through a third person.*

It will be noted that when Calhoun swore to the complaint upon which the warrant of arrest in this

case was issued, he made no statements therein which are contained in the Braidwood and O'Brien affidavits, but contented himself with alleging "upon information and belief" that the petitioners herein and others had conspired to *commit a nuisance against the United States* in possessing, selling, etc., intoxicating liquor "beginning on January 1, 1929, and continuing on each and every day thereafter down to and including the date of the filing of this complaint" viz. June 5, 1929. No overt act was set forth in the complaint except the purchase of one Peerless automobile on May 23, 1929.

It is submitted that if Calhoun's complaint is bad and the warrant issued under it invalid because of the failure to state facts showing probable cause, then O'Brien must be concluded upon what Calhoun stated on June 5, 1929. If O'Brien is now to be permitted to state additional facts which are alleged to have been known to both Calhoun and himself at that time and thereby to justify an arrest as though it were an arrest made entirely without a warrant, then both the spirit and the letter of the Fourth Amendment have been violated and it is difficult to see how any proper curb can be put upon the illegal and improper practices of arresting officers such as occurred in this case.

A further and insurmountable objection to the arrests is that there is not a scintilla of evidence in this case (even third hand) giving probable cause for the belief that the defendants, at the time of the arrests, were then engaged in the commission of a felony. Although the insufficient complaint of Calhoun alleges a conspiracy beginning on January 1st, 1929, and con-

tinuing to June 5, 1929, and the arrests were made on June 6, 1929, the information alleged to have been furnished by Braidwood related to alleged transactions between March, 1927, and September, 1928. There was no information furnished as to any alleged transactions from September, 1928, to June 6, 1929, when the arrests were made. Therefore, a period of nine months had elapsed between the date of the last transaction alleged by Braidwood and the date of the arrests.

This does not constitute probable cause for belief that the defendants were engaged in violation of law at the time of the arrests.

In the case of *United States v. Dziadus*, 289 Fed., 837, the Court held that an averment in an affidavit to the effect that, three months previously, a still was found on the premises was insufficient to establish probable cause for believing that the premises were being used for the unlawful sale of intoxicating liquor.

In *Rupinski v. United States*, 4 Fed. (2d) 17, the Circuit Court of Appeals for the Sixth Circuit held that the affidavit of a single sale, over two months before the making of an affidavit for a search warrant, was insufficient to justify the issuance of the warrant.

In *Dandrea v. United States*, 7 Fed. (2nd) 861, the Circuit Court of Appeals for the Eighth Circuit held that an affidavit that liquor was purchased 42 days before execution of the affidavit was not sufficient to show a present existing cause.

In *People v. Chippewa Circuit Judge*, 226 Mich. 326, 328, 197 N. W., 539, 540, where more than 60 days

had elapsed between the making of the affidavit and the application for a search warrant, the Court said:

> "A search warrant must issue, if at all, upon an *existing cause*. A search warrant is no general arm for ferreting out crime, but a special proceeding, based on present cause, hedged by strict constitutional provisions, must be speedily executed, and cannot be issued on a showing of facts existing over 60 days before, and not in any way brought down to the date the warrant is issued." (Italics supplied.)

We submit it is obvious that, if probable cause did not exist for the issuance of a warrant at the time of the arrests, probable cause did not exist for an arrest without a warrant.

(*e*) *Reasonable or probable cause does not exist where the officer obtained his information solely from a superior officer who in turn obtained it from the unsworn statement of another.*

If anything the policy of the law would seem to demand a higher quality of probable cause in a case where there is no submission of the supposed probable cause to a magistrate or a judicial officer before it is acted upon and before the arrest is made, than is demanded in warrant cases.

O'Brien could not have sworn to a complaint for a warrant of arrest. He himself had no knowledge that a felony had been committed, or that Gowen or Bartels had committed it. He only know what Calhoun had told him, which in turn had been told to Calhoun by

Braidwood. Even Calhoun could not have made a proper affidavit. The only person in the chain of information who had obtained testifying knowledge was Braidwood himself.

This brings us to the real situation in all its nakedness. O'Brien, standing at best in the position of a private citizen, claims he had probable cause when all he had was information twice removed, plus a belief and information coming from Calhoun who himself had no powers greater than those of a private citizen, and Calhoun in turn received his information from Braidwood who was only a private citizen and not connected with the Prohibition Service at all.

O'Brien must therefore rely for his probable cause upon Braidwood to whom he never spoke, whom he never met, and whose story was told him at second hand by Calhoun. This is probable cause twice removed and thus doubly dangerous. (See affidavits of O'Brien, R. 30; Calhoun, R. 28; and Braidwood, R. 21.)

The two lower courts have held in the case at bar that the information constituting probable cause may be obtained from others as well as from personal observation, and cite certain cases in support of that ruling which we submit are not in point and do not apply to the facts in this case.

The principal case cited by the lower courts is that of *Carroll v. United States*, 267 U. S. 132, which involved the search and seizure of an automobile found to be carrying intoxicating liquors and the arrest of the driver thereof, without a warrant.

There are many distinctions between the Carroll case and the case at bar.

Two of the officers who made the search and seizure had personal knowledge that the automobile in question was used for the transportation of liquors, they having negotiated with the defendants for the purchase of liquor and the defendants had come to the apartment where the negotiations were carried on in the automobile which the agents subsequently searched and seized. This court found that probable cause existed based upon "the facts and circumstances *within their knowledge* and of which they had reasonably trustworthy information." (p. 162.)

A further distinction between the two cases is that in the Carroll case the ruling was in justification of the seizure primarily and the arrest followed as a corollary of such seizure. The court held that, under Section 26, Title II, of the National Prohibition Act, the primary purpose is the seizure and destruction of the contraband liquor being transported and the provisions for forfeiture of the vehicle and arrest of the transporter are merely incidental. The court referred to the argument of the defendant that the seizure can only be justified if the arrest is valid, and said (p. 158):

> "The theory is unsound. The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law."

In the case at bar, the arrest must be sustained; otherwise, the seizure was unlawful.

A still further and controlling distinction between the two cases is found in the fact that the Carroll case involved principles to be applied to movable vehicles which have no application to the present case. This court pointed out the difference in its opinion (p. 153) when it said:

> "We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a *necessary difference* between a search of a store, dwelling house or other structure in respect of which *a proper official warrant readily may be obtained*, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." (Italics supplied.)

Further on in this opinion, this court said (p. 156):

> "In cases where the securing of a warrant is reasonably practicable, it must be used, and when properly supported by affidavit and issued after judicial approval protects the seizing officer against a suit for damages. In cases where seizure is impossible except without a warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause. *United States v. Kaplan*, 286 Fed. 963, 972."

In the instant case, the premises which the officers entered could not be moved away and it was the duty of the officers, assuming the existence of probable cause sufficient to support a warrant, to obtain a proper official warrant before they entered the premises and made the arrests and seizures.

In the light of the above discussion of the Carroll case, we think it is clear that it does not authorize prohibition officers to arrest without a warrant persons quietly in their offices, their only information being third hand information that the persons are engaged in a conspiracy to violate the Prohibition Act.

That, even in the case of moving vehicles, the officers making the seizure without a warrant must have knowledge that the law is being violated is established by the case of *Gambino v. United States*, 275 U. S. 310, in which this court held that the search of an automobile by New York State troopers and the seizure of intoxicating liquor found therein was without probable cause and the admission in evidence of the liquor so seized violated the Fourth and Fifth Amendments.

As the Carroll case is not an authority for the contentions of the Government in this case, the other cases cited by the courts below are no stronger. They involve probable cause based upon evidence of the senses of the arresting officers. In *Brady v. United States*, 300 Fed. 540, there were the suspicious actions of the driver of a car; in *King v. United States*, 1 Fed. (2d) 931, positive information that defendant was transporting opium (another automobile case); in *White v. United States*, 15 Fed. (2d) 870, evidence of sales of

cocaine; in *United States v. Rembert,* 284 Fed. 996, the driving of a car by a person who was obviously intoxicated.

In *Schencks v. United States,* 2 Fed. (2d) 185, 186, the Court of Appeals of the District of Columbia said:

> "If the peace officer has reason to believe and does believe that a search or seizure ought to be made, he should state in his affidavit the facts which led him to that conclusion, and which were known to him of his own knowledge. If he has no first-hand information as to the material facts, but has been informed by another as to the facts or conditions which would justify the issuance of process for search or seizure, the officer should secure the informer's affidavit positively alleging of the latter's own knowledge the existence of such facts or conditions. * * * To permit them to search for evidence * * * *because they were informed and believed that certain facts existed, would leave the home, the property, and the person of the citizen at the mercy of mere suspicion, and of misstatements and misinformation for which no one could be held accountable.*" (Italics supplied.)

In *Director General v. Kastenbaum,* 263 U. S. 25 (1923) a railroad detective accompanied by two city policemen arrested defendant without a warrant upon a suspicion of his being connected with the theft of butter from a freight car. After being released on bail, he was brought to hearing before a magistrate on a charge of grand larceny, and after four or five ad-

journments at the instance of the prosecution, the magistrate discharged Kastenbaum. This court said (p. 28):

> "Good faith is not enough to constitute probable cause. That faith must be grounded on *facts within the knowledge* of the Director General's agent which in the judgment of the court would make his faith reasonable." (Italics supplied.)

In *Lawson v. United States*, 9 Fed. (2d) 746 (C. C. A. 7th) the court said "this probable cause must be determined by the existence of facts known to the officer before and not after the search."

In *Elrod v. Moss*, 278 Fed. 123 (C. C. A. 4th), the court said at page 130:

> "Under the federal as well as the state statutes, to justify search and seizure or arrest without warrant, the officer must have *direct personal knowledge* through his hearing, sight or other sense, of the commission of crime by the accused." (Italics supplied.)

In *Lochnane v. United States*, 2 Fed. (2d) 427 (C. C. A. 9th) the Court quoted from *Giles v. United States*, 284 Fed. 208, 214, as follows:

> "It is not enough that the form of this affidavit leaves it possible that the affiant might have personal knowledge as to the possession of intoxicating liquor and as to facts tending to show that such possession was illegal. It should have affirmatively appeared that *he had personal knowledge* of facts competent for a jury

> to consider, and the facts, and not his conclusion from the facts, should have been before the commissioner." (Italics supplied.)

In *United States v. Baumert*, 179 Fed. 735 (D. C. N. D. N. Y), Judge Ray stated that the person who states the facts must speak from personal knowledge as follows (p. 742):

> "Under the common law the information was not necessarily verified; but, as stated, this led to abuses and the adoption of the Fourth Amendment to the Constitution, which in legal effect demands that no warrant shall issue upon an information filed by the United States attorney, unless it states *facts*, a crime, etc., and is supported by the oath of the officer filing it, *who must speak from personal knowledge, or by the oaths or affirmations of others who speak from personal knowledge.*" (Italics supplied.)

See also:

United States v. Tureaud, 20 Fed. 621.
United States v. Wells, 225 Fed. 320.
Weeks v. United States, 216 Fed. 293, 301.
In re Blum, 30 N. Y. Supp. 396, 9 Misc. 571.

In *Comfort v. Fulton*, 39 Barb. 56, (1861), Peckham, J. declares:

> "In this case information from his son by the complainant was no proof whatever. It cannot be by any possibility 'probable cause supported by oath'."

(*f*) *Probable cause which is insufficient as the basis of a warrant of arrest is insufficient to justify an arrest without a warrant.*

Brown v. United States, 4 Fed. (2d) 246 (C. C. A. 9th), was a case where the arresting officer acted only on suspicion. The court held that the arrest was illegal and applied the test whether a warrant of arrest could have issued on the information in the officer's possession and said, at page 247, in reversing the conviction of defendant:

> "If, instead of arresting the plaintiff in error, the officer had presented all the facts within his knowledge and all the information at hand to a magistrate, no magistrate would issue a warrant of arrest for the plaintiff in error; no magistrate would hold the plaintiff in error to answer for a crime before another tribunal; no grand jury would indict; no court would submit the case to a jury; and, if the officer were sued for false imprisonment, no court would instruct that the arrest was justified, assuming all the foregoing testimony to be true."

The case thus squarely lays down the proposition that where there is a lack of probable cause for the issuance of a warrant, there is also, necessarily, a lack of probable cause for arrest without a warrant.

Cornelius, on Searches and Seizure (1926), at page 279, also lays down the rule that the probable cause in the case of an arrest without warrant should be of the same quality as probable cause required for the issuance of a warrant:

> "The term 'probable cause' used in connection search warrants is a convertible term with 'probable cause' used in connection with arrest without warrant for suspicion of felony, and is the same term used in actions for malicious prosecution or for false arrest or imprisonment."

In *Malcolmson v. Scott* (1885), 56 Mich. 459, the defendant's were police officers. They received a letter from J. H. in the name of the Chief of Police of Philadelphia stating that the plaintiff had absconded with funds of a lodge, and describing bonds and money taken and giving a description of the plaintiff and means of his identification, and on this information they arrested the plaintiff without a warrant. Held, that this was insufficient probable cause, and the court said at pages 463-464:

> "If the act had been done here, and no other facts were alleged than this letter shows, no crime would be charged, and if all were set out in a warrant, the warrant would be void. * * * It is difficult to see how that would be reasonable cause without a warrant, which would not be under a warrant."

See also:

Simmons v. Vandyke (1894), 138 Ind. 380, a case similar in its facts to *Malcolmson v. Scott.*

In the case of *Henderson v. United States*, 12 Fed. (2d) 528, the Circuit Court of Appeals for the Fourth Circuit held that where the securing of a warrant for arrest was reasonably practicable it must be done, and

that an arrest and search executed without a warrant under such circumstances were invalid.

In the course of its opinion the court said:

> "Can it be the law that an officer for the purpose of seeking evidence may invade the home of a citizen and search it without the oath or affirmation required by the Constitution and without having the question of probable cause determined by a judicial officer; upon merely deciding for himself that there is probable cause to believe that some person within the home is guilty of a felonious violation of a Revenue Act?"

SECOND POINT.

THE SEARCH AND SEIZURE OF PETITIONERS' BOOKS AND PAPERS WAS AN "UNREASONABLE SEARCH AND SEIZURE" IN VIOLATION OF THE FOURTH AND FIFTH AMENDMENTS.

(*a*) *A general exploratory search of the office of petitioners in which they were arrested, made without the authority of a search warrant, is illegal.*

In support of the proposition we rely on the celebrated case of *Boyd v. United States*, 116 U. S. 616, which Mr. Justice Brandeis characterized as "a case that will be remembered as long as civil liberty lives in the United States" (see *Olmstead v. United States*, 277 U. S. 438, 474). That case laid down the great principle that a man's books and papers cannot be forcibly seized and used in evidence against him. Mr. Justice Bradley speaking for the court said (p. 623):

> "The search for and seizure of stolen or forfeited goods or goods liable to duties and con-

cealed to avoid the payment thereof are totally different things *from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him.* The two *things differ toto coelo.* In the one case, the Government is entitled to the possession of the property, in the other it is not. * * *

"In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history or the controversies on the subject, both in this country and in England. The practice had obtained in the Colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English Liberty and the fundamental principles of law, that ever was found in an English law book'; since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.' "

The doctrine of the *Boyd* case has been often approved by this court and has been followed in a num-

ber of cases. *Weeks v. United States*, 232 U. S. 383; *Silverthorne Lumber Co. v. United States*, 251 U. S. 385; *Gouled v. United States*, 255 U. S. 298; *Carroll v. United States*, 267 U. S. 132.

There is nothing in the case of *Marron v. United States*, 275 U. S. 192, so strongly relied upon by the courts below, to overrule the *Boyd* case or to authorize the general and exploratory search undertaken in the case at bar.

Indeed Mr. Justice Butler cited the *Boyd* case in the opinion in the *Marron* case and quoted with approval from the language of Mr. Justice Bradley.

But if the contention of the Government is adopted on this appeal and it is held that the *Marron* case authorizes seizure of the papers and documents in the instant case, it would be necessary to say that the *Marron* case overrules the *Boyd* case, something which probably was furthest from the mind of the court.

Prior to the *Marron* decision, the Circuit Court of Appeals below had decided in *United States v. Kirschenblatt*, 16 Fed. (2d) 202, that:

> "the whole of a man's correspondence, his books of account, the record of his business, in general the sum of his documentary property, these in our judgment are as inviolate upon his arrest as they certainly are upon search warrant."

Now, since the *Marron* case, the same court holds in the case at bar that:

> "In *United States v. Kirschenblatt* this court laid down a different rule, but we do not think it can stand after the Marron decision." (R. 77.)

We believe it can be demonstrated readily that the lower court misinterpreted the ruling of this court in the *Marron* case.

In that case, there was a *valid* search warrant; the officers thereupon made a *lawful* search of the premises; while making such lawful search they *saw* intoxicating liquors being *unlawfully* sold, whereupon they *lawfully* arrested, without a warrant, a person there actually in charge of the premises and actually engaged, *in the presence of the officers*, in a conspiracy to maintain them. The documents seized were incidentally discovered while the officers were searching for liquor.

In the present case, there was no valid search warrant or warrant of arrest; the entry of the officers on the premises was *unlawful;* no violation of law was taking place in their presence. Notwithstanding the absence of any authority so to do, the officers ransacked petitioners' premises upon the false representation that they possessed a search warrant; under threat of breaking into his desk and safe, forced petitioner Gowen to open them, and removed from them and from other desks in other rooms private papers, documents and property belonging to the petitioners.

The Government accepted the decision in *United States v. Kirschenblatt* and did not apply for certiorari. The difference between the facts in the *Kirschenblatt* case and in the *Marron* case is pointed out in the Government's brief filed in this court in opposition to Marron's petition for certiorari, the following quotation being taken from page 12:

"There are statements in that opinion which indicate that the court believed that the only incriminating papers (not contraband or instruments of the crime) which may be seized as incident to a lawful arrest are those found on the person of the man arrested; *but the record in that case showed that to disclose the incriminating documents the officers ransacked the premises in a high-handed way, not to discover contraband articles described in the warrant but merely to obtain incriminating documents, and it was for this reason that the United States made no application for certiorari to review that decision.*

"There was in the instant case no rummaging among defendant's papers for incriminating evidence.

"Whether a search and seizure are reasonable must depend upon the facts in each particular case. At the time of the seizure in the instant case the officers were engaged in the execution of a valid warrant directing the search of the premises for intoxicating liquor and property designed for its manufacture. They had no warrant for the seizure of papers *nor was any general search made therefor.* The documents seized were *incidentally discovered* while the officers were searching for liquor."

As pointed out in the Government's brief, in the *Marron* case, no general search was made, the documents seized were incidentally discovered. Not so, in the present case. Hence we submit that the *Marron* decision does not authorize a general search and seizure of private documents and papers, and that the

seizure in this case was unconstitutional under the doctrine laid down in Boyd v. United States, supra.

(b) The seizure of books and papers located on premises where an arrest is made is illegal where the books and papers are not the means or fruits of the crime but are merely private papers of the petitioners.

As we have stated heretofore, in the courts below the decision in the case of *Marron v. United States*, 275 U. S. 192, was relied upon to sustain the validity of the search and seizure of the books and private papers. The Circuit Court of Appeals said:

> "This case the appellants attempt to distinguish upon the ground that the papers and ledger there seized were instruments of the crime of maintaining a nuisance while here the papers and documents are merely incriminatory evidence of the crime of conspiracy. We do not think the distinction can be sustained. * * * We regard the Marron case as controlling and as sustaining the seizure in suit."

For the reasons heretofore stated, we respectfully submit that what is said about the *Marron* case in sustaining the validity of the seizure of books and papers is inapplicable in the present instance.

It is also difficult to see how the Government can take the position that these papers are instruments of crime when O'Brien's own affidavit indicates that he thought of them as evidence and not as instruments of crime, because in referring to the papers and documents, he says:

> "• • • All of which pertained on the face thereof to unlawful dealings by the said Gowen and Bartels in intoxicating liquors." (R. 33.)

In *United States v. Kirschenblatt* (C. C. A. 2d), 16 Fed. (2d) 202, 203, a warrant was issued to search the offices of one Kirsch. Kirschenblatt was arrested and a quantity of papers of various kind was seized. The Circuit Court of Appeals held that the arrest of Kirschenblatt was legal, but it affirmed the order of the District Court directing the return of all the papers seized. Judge Learned Hand, speaking for the unanimous court, said:

> "Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him, once you have gained lawful entry, either by means of a search warrant or by his consent." Citing *Carroll v. United States*, 267 U. S. 132; *Agnello v. United States*, 269 U. S. 20; and *Gouled v. United States*, 255 U. S. 298.

In *Kirvin v. United States*, 5 Fed. (2d) 285, the Circuit Court of Appeals for the Second Circuit had earlier passed on this question and held as follows:

> "It is next contended that the officers who were executing the warrant were lawfully on the premises, and that, being there, they might seize the papers. But as to the records they had no search warrant. They were as trespassers in taking these documents. It is further argued that the plaintiff in error was ar-

> rested at the time the papers were seized and therefore the seizure was lawful. *U. S. v. Kraus* (D. C.) 270 Fed. 579. But the papers were not on his person, and the distinction has been recognized between what one carries about on his person and what one keeps in his house" (page 285).

In *United States v. Poller* (D. C. S. D. N. Y., Jan. 16, 1930), Judge Coleman held that defendants had lawfully been arrested in their place of business, but directed that the papers seized on the premises should be returned to them. In the course of his opinion he expressly pointed out that the *Marron* case did not overrule the *Kirschenblatt* case, saying:

> "These lawful arrests, however, I do not think justified the agents in ransacking the respective premises and seizing every scrap of documentary evidence they could lay their hands on. Assuming that they confined their search to the rooms in which the arrests were made, they had no right to examine the defendant's books and documents merely for the purpose of getting evidence against them. * * * In the case at bar the premises searched and the documents seized had no such relation to the crime."

In the light of this decision it is respectfully submitted that even if the arrest was a lawful one, the search and seizure were unlawful. See also *United States v. Spallino* (D. C. W. D. N. Y., 1927), 21 Fed. (2d) 567, and *United States v. Epstein* (D. C. E. D. N. Y., 1929), 33 Fed (2d) 982. On that ground alone

the District Court should have granted the motion for the return of the papers and the suppression of their use as evidence, and the failure to do so constituted a violation of the constitutional rights of petitioners

(c) *A search to secure evidence to be used against defendants in a criminal proceeding is within the constitutional prohibition.*

In *United States ex rel. Frank v. Mathues*, 17 Fed. (2d) 274, the District Court for the Eastern District of Pennsylvania, said:

> "There seems to be an impression, and it is justified by some of the decisions, that the search of other premises than a dwelling house is lawful, if the searching officer without a search warrant has contrived to intrude himself upon the premises without the permission of the owner or occupant, and if he then perceives, through his senses, whether of sight, sound, taste, smell, or touch, the evidence of crime, he is justified in making a seizure. In other words, that he has then put himself under the protection of the common-law rule justifying a seizure and arrest, because of the result of his unwarranted search, rather than because of a lawful entry. * * * Excepting, therefore, cases where an officer is already lawfully upon the premises, and not there as a trespasser, Congress intended that access should be obtained under the authority of a search warrant. Entrance upon premises with an invalid search warrant is of the same effect as with no search warrant."

In *Gouled v. United States*, 255 U. S. 298, 305, this court has held:

> "The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a Government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights.
>
> * * * * * * *
>
> "In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case."

In *United States v. Friedberg*, 233 Fed. 313, 318, (D. C. E. D. Pa. 1916) under a search warrant author-

izing search of petitioner's place of business for tobacco, petitioner's private papers, both at his place of business and at his private residence, were examined and seized. The Court said as follows:

> "The Government seeks to justify the seizure entirely upon the ground that the papers are to be used as evidence upon which the Government intends to prove the guilt of the defendant in a criminal prosecution and to forfeit his property in the proceedings in rem contemplated under section 3453. The papers seized are not forfeitable, and hence not subject to seizure. In the seizure, the revenue officers were acting clearly beyond the authority of the warrant, without authority of law, and in violation of the petitioner's constitutional rights. The exigency of necessity for obtaining evidence in a particular case does not justify the tendency which has grown up to proceed by "raid" of the house and property of a supposed offender, rather than by the orderly process provided by law and guaranteed by the Constitution."

See also *United States v. Mills*, 185 Fed. 318 (Circuit Court, S. D. New York, 1911), where under a warrant of arrest for conspiracy to defraud the United States in connection with imported merchandise, the marshal seized not only the documents concerning the particular importation, but also all books and papers of defendant's firm covering their business as importers. It was held that such seizure was improper under the *Boyd* case.

In *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 306, this court said:

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 479), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. * * * *It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up.*" (Italics supplied.)

(*d*) *An unlawful search and seizure may not be justified by what is found.*

In *Byars v. United States*, 273 U. S. 29, this court speaking through Mr. Justice Sutherland, said:

> "A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this court, nor can it be tolerated under our constitutional system, that evidence of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed."

And in *Garske v. United States*, 1 Fed. (2d) 620, 625, Judge Kenyon, speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

"If the seizure is merely based upon a suspicion, and the facts are not sufficient to justify an arrest, the subsequent discovery by an examination of the evidence, secured by the seizure, that the suspicion was in fact well founded, is not sufficient to make what was unlawful at its commencement, a lawful search. *United States v. Slusser* (D. C.) 270 Fed. 818."

See also:

U. S. v. Olmstead, 7 Fed. (2d) 760.
In re Lobosco, 11 Fed (2d) 892.
U. S. v. Spallino, 21 Fed. (2d) 567.
In re Oryell, 28 Fed. (2d) 639.

THIRD POINT

THE BOOKS AND PAPERS SEIZED SHOULD BE RETURNED TO PETITIONERS AND THE EVIDENCE OBTAINED THROUGH THE SEIZURE SHOULD BE SUPPRESSED.

It is well settled that when properly invoked the Fifth Amendment protects every person from incrimination by the use of evidence obtained through search and seizure made in violation of his rights under the Fifth Amendment.

Boyd v. United States, 116 U. S. 616, 630.
Weeks v. United States, 232 U. S. 383, 398.
Silverthorne Lumber Co. v. United States, 251 U. S. 385, 391.
Gouled v. United States, 255 U. S. 298, 306.
Amos v. United States, 255 U. S. 313, 316.

At the time of the institution of the petition there were no proceedings of any kind pending with respect to any of petitioners herein, except that a complaint charging a conspiracy to violate the National Prohibition Act had been filed against the petitioners with the United States Commissioner for the Southern District of New York. A warrant of arrest had been issued on that complaint and the defendants Gowen and Bartels had been arrested, arraigned and held in bail to answer the complaint. (R. 71.) Upon argument in the District Court this complaint and warrant were conceded to be invalid (R. 55).

Perlman v. United States, 247 U. S. 7 (1918) is a direct authority for the proposition that a motion for the return of seized documents and the suppression of their use in evidence is justified notwithstanding the proceedings before the United States Commissioner. The rationale of this ruling appears to be that the fact that a complaint is pending before the United States Commissioner does not mean that a criminal proceeding has been instituted against a person. Perlman had been arrested in the Southern District of New York and held by the United States Commissioner for the Grand Jury on the charge of perjury. He was subsequently indicted but his motion for the return of certain papers and documents seized from him was made prior to his indictment. The motion was denied and he thereupon appealed. The order denying the motion was reviewed by the Supreme Court. In denying the motion of the Government to dismiss the appeal on the ground that the order ap-

pealed from was an interlocutory opinion and therefore the court was without jurisdiction to review it, Mr. Justice McKenna, speaking for the unanimous court, said:

> "The second contention of the Government is somewhat strange, that is, that the order granted upon its solicitation was not final as to Perlman but interlocutory in a proceeding not yet brought and depending upon it to be brought. In other words, that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur."

In *Kirvin v. United States*, 5 Fed. (2d) 282 (C. C. A. 2d), Judge Manton held that a commissioner when he issues warrants of arrest in a preliminary hearing, is not a judge of the United States within the constitutional sense, and a preliminary examination before him is not a proceeding in any court of the United States.

In *Burdeau v. McDowell*, 256 U. S. 465, the appeal was from an order denying a motion for the return of certain documents and papers and was made before the return of any indictment. The United States Supreme Court *sub silentio* assumed its jurisdiction and reviewed the order appealed from.

Finally in *Cogen v. United States*, 278 U. S. 221, 225, this court said:

> "The independent character of the summary proceeding is clear * * * wherever the

> motion is filed before there is any indictment or information against the movant, like the motions in *Perlman v. United States*, 247 U. S. 7, and *Bardeau v. McDowell*, 256 U. S. 465; * * *"

Conclusion.

It is respectfully submitted that the decision of the court below should be reversed and the petition of the petitioners herein for the return of the books and papers seized and their suppression as evidence should be granted.

Respectfully submitted,

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[redacted],
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No. ~~800~~ 111

In the Supreme Court of the United States

OCTOBER TERM, 1929

GO-BART IMPORTING COMPANY, INC., PHILIP D. GOWEN AND WILLIAM BARTELS, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 890

GO-BART IMPORTING COMPANY, INC., PHILIP D. Gowen and William Bartels, petitioners

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Neither the opinion of the District Court (R. 84) nor that of the Circuit Court of Appeals (R. 110) has as yet been reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered April 15, 1930. (R. 120.) The petition for certiorari was filed May 12, 1930. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioners were entitled to the return of documents alleged to have been illegally seized as an incident to the arrest of petitioners Gowen and Bartels, the two principal officers of petitioner corporation, and to the suppression of such documents as evidence.

STATEMENT

On June 5, 1929, a warrant for the arrest of petitioners Gowen and Bartels and others was issued by a United States Commissioner for the Southern District of New York directed to the Marshal for that District. (R. 28.) The warrant was based on a complaint of Special Agent in Charge Calhoun, of the Bureau of Prohibition, verified June 5, 1929, which charged them with being parties to a conspiracy to violate the National Prohibition Act (R. 30), but failed to show any facts to sustain the charge or to justify the issuance of the warrant.

Certified copies of the warrant and complaint were placed in the hands of Prohibition Agent O'Brien who, on June 6, 1929, went to the office of the Go-Bart Importing Company, accompanied by two other agents, and arrested petitioners Gowen and Bartels, the President and Secretary and Treasurer, respectively, of the Company. The persons of Gowen and Bartels and the offices of the company were thereupon searched and various papers and documents seized and removed to the offices of the prohibition authorities. (R. 47–50.)

In August, 1929, a motion was filed in the District Court for the Southern District of New York, bearing the same title as the criminal proceeding pending before the United States Commissioner and supported by the affidavit of each petitioner (R. 1, 4–27), which demanded the return of the documents and papers to the petitioners and the suppression of their use in evidence.[1] Pursuant to such motion the District Court issued an order to show cause (R. 1–3), to which affidavits were filed in response.

The affidavit of Ernest Braidwood (R. 33–42), an informer but not a Government employee, alleged that from 1927 to 1929 he dealt with petitioners Gowen and Bartels (hereinafter, for brevity, referred to as the petitioners) directly in the offices in which they were arrested, buying liquor from them, receiving instruction in the methods of conducting their business of importing and selling liquor, visiting their hidden storehouses and generally being admitted to the secrets of their illicit business. The affidavit described plans of petitioners to smuggle liquors into the country and showed that petitioners formed the Go-Bart Importing Company, Inc., after the advent of prohibition, for the express purpose of handling liquor. The affidavit clearly establishes that for

[1] Some of the documents and papers apparently belong to the Go-Bart Company (R. 25), but no attempt is made in the affidavits to segregate those belonging to the corporation from those of the individual petitioners, and no point is made in the petition for certiorari based on any technical ownership of the papers in the corporation.

nearly two years petitioners participated as principals in the commission of the felony for which they were arrested.

The affidavit of William J. Calhoun, Special Agent in Charge (R. 43–45), set forth that all these facts were communicated to him by Braidwood and that he had by independent means checked and verified them and had in turn communicated them to his subordinate, Prohibition Agent O'Brien, who made the arrests and seizure.

O'Brien's affidavit (R. 46–50) stated that he arrested petitioners in the office of the Go-Bart Company; that a search of the persons of petitioners and the immediate premises disclosed both liquors and documents vital to the conduct of the criminal enterprise; and that these were seized. No demand was made in this proceeding for the return of the liquor.

Affidavits by the two prohibition agents who accompanied O'Brien, relating the details of the arrests and the search and seizure, were also filed. (R. 78–83.)

After a hearing the District Court denied the motion for the return of the papers. (R. 84–88, 99.) A motion for rehearing was also denied. (R. 97–99.) On appeal the Circuit Court of Appeals affirmed the order of the District Court except in one respect (not material here), as to which it modified the order. (R. 110–121.)

ARGUMENT

Petitioners contend that the search and seizure should not be sustained, because the agents in obtaining the warrant made an insufficient complaint, appropriated a warrant directed to the United States Marshal and searched petitioners' premises upon a representation that they had a search warrant. They further contend that the procedure in this case violated their rights under the Fourth Amendment, because it amounted to an exploratory search for incriminating evidence by an agent acting on information communicated to him by another officer who had in turn received it from a third person.

Since the warrant of arrest was based upon an insufficient complaint and was addressed to the Marshal instead of to the prohibition agents, no attempt was made by the Government to justify the seizure under the warrant. (R. 85.) Agent O'Brien alleges in his affidavit that he made no attempt to serve the warrant of arrest (R. 49) but merely took it with him "for the purpose of reference as to the names of the various defendants." (R. 48.) The other officers also allege that no warrant was served at any time. (R. 79, 82.) This is contradicted by the moving affidavits of petitioners, who charge that O'Brien asserted that he had a search warrant and an arrest warrant and exhibited a paper to justify his demand for a search of the offices. (R. 5, 13, 51, 54.)

The District Court was inclined to accept the story of petitioners, but nevertheless held that this did not invalidate the seizure as an incident to the arrest,

which was one that could lawfully be made without a warrant. (R. 85–86, 88.) The Circuit Court of Appeals called attention to the fact that no return was made under the warrant, and stated that it was doubtful whether an officer who makes no return of service of a warrant can be said to act under it. It intimated that an officer who tells the accused that he acts under a warrant can justify only by showing a legal warrant, and held that, even assuming that O'Brien purported to act under the warrant, the contention that he may not otherwise justify can not be sustained. (R. 113.)

This ruling was based upon this Court's decision in *Stallings* v. *Splain*, 253 U. S. 339, 342, where it was held that the possession of an insufficient warrant did not render illegal an arrest which could lawfully be made without it. See also *Marron* v. *United States*, 275 U. S. 192, 198–199; *Vachina* v. *United States* (C. C. A. 9th), 283 Fed. 35, 36; *Fryer* v. *United States* (C. C. A. 6th), 3 F. (2d) 558; *Billingsley* v. *United States* (C. C. A. 8th), 16 F. (2d) 754, 756; *Lee Kwong Nom* v. *United States* (C. C. A. 2d), 20 F. (2d) 470, 472.

If the arrests were lawfully made, the contemporaneous search of the persons of the petitioners and of their offices, and the seizure of "things connected with the crime as its fruits or as the means by which it was committed" were justified. *Agnello* v. *United States*, 269 U. S. 20, 30; *Carroll* v. *United States*, 267 U. S. 132, 158; *Lee Kwong Nom* v. *United States*, *supra*, p. 472.

We submit that the arrests were lawful. The prohibition agent making them had at least the authority of a private person to make an arrest without a warrant. Where a felony has in fact been committed, a private person may arrest without a warrant if he has reasonable ground to believe that the person arrested committed the crime. *Brady* v. *United States* (C. C. A. 6th), 300 Fed. 540, 543; *Burns* v. *Erben*, 40 N. Y. 463, 466; Bishop's New Crim. Proc., 2d Ed., Vol. 1, par. 181 (2). See also *Kurtz* v. *Moffitt*, 115 U. S. 487, 498. In the *Carroll case*, *supra*, this Court said (p. 161):

> The necessity for probable cause in justifying seizures on land or sea, in making arrests without warrant for past felonies, * * * has led to frequent definition of the phrase. In *Stacey* v. *Emery*, 97 U. S. 642, 645 * * * this Court defined probable cause as follows:
>
> "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."

The information constituting probable cause may be obtained from others as well as from personal observation, provided the facts are clearly established and are sufficient to warrant a man of reasonable caution in the belief that the person arrested is guilty of the crime charged. *Carroll* v. *United States*, *supra*, p. 157; *Brady* v. *United States*, *supra*; *King* v. *United States* (C. C. A. 9th), 1 F. (2d) 931; *White* v. *United States* (C. C. A. 9th), 16 F. (2d)

870, 871; *United States* v. *Rembert* (S. D. Tex.), 284 Fed. 996, 1001.

Both courts below were of the opinion that the affidavits establish not only that a felony had been committed, but also that Agent O'Brien had, prior to the arrests, reasonable cause to believe that petitioners were parties to its commission. (R. 87, 114–115.) If their conclusions were correct (and we submit that they were), it follows that the arrests, as well as the contemporaneous search and seizure of the papers and documents as an incident thereto, were lawful.

Petitioners' characterization of the agents' conduct as a ransacking of the offices in a general and exploratory search for incriminating papers is not justified. Following the arrests the authority of the agents to search for and seize the things used to carry on the criminal enterprise extended to all parts of the premises employed for the unlawful purpose. *Marron case*, *supra*, p. 199.

The papers seized included index lists with names and addresses of customers, together with amounts outstanding as payable for liquors; detailed inventories of liquors on hand, received, sold, and delivered; ledger accounts setting forth exact purchases of liquors made by particular customers, the amounts due, and payments made thereon; and letters and other correspondence having to do with the purchase, sale, and delivery of intoxicating liquors. (R. 50.)

As was said with respect to the ledger and bills in the *Marron case*, p. 199, they constituted part

of the equipment actually used to commit the offence. They were convenient, if not in fact necessary, to the conduct of the unlawful enterprise, and as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on.

United States v. *Kirschenblatt*, 16 F. (2d) 202, upon which petitioners strongly rely, was decided by the same Circuit Court of Appeals that decided the instant case. In its present opinion the court said (R. 118): "We do not think it can stand after the *Marron* decision." The same may also be said of *United States* v. *Henderson* (C. C. A. 4th), 12 F. (2d) 528, if indeed, as petitioners contend, it conflicts at all with the instant decision.

CONCLUSION

The case was correctly decided below, and there is no such conflict of decisions as to justify a review by this Court. The petition should therefore be denied.

Respectfully submitted.

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MAY, 1930.

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 111

GO-BART IMPORTING CO., PHILIP D. GOWEN, AND WILLIAM BARTELS, petitioners

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the District Court (R. 54) is unreported. The opinion of the Circuit Court of Appeals (R. 69) is reported in 40 F. (2d) 593.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 15, 1930. (R. 79.) The petition for certiorari was filed May 12, 1930, and was granted June 2, 1930. (R. 80.) Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Whether the Circuit Court of Appeals had jurisdiction is dependent upon whether the order of the District Court appealed from was a "final decision," within the meaning of Section 128 of the Judicial Code. (U. S. C., Title 28, Sec. 225; *Ex parte Tiffany*, 252 U. S. 32, 36.) That order denied a motion for the suppression as evidence and for the return of papers alleged to have been seized in violation of the petitioners' rights under the Fourth and Fifth Amendments. (R. 57, 63–64.) Although made in the District Court, the motion was entitled as in proceedings begun by a complaint filed with a United States commissioner charging the petitioners and others with conspiracy to violate the National Prohibition Act. (R. 1, 19–21.) The "Order to Show Cause," signed by District Judge Boynton, declared (R. 1–2):

> Upon reading and filing the complaint *herein verified* by William J. Calhoun on the 5th day of June, 1929, the warrant of arrest *herein issued* by Honorable Garrett W. Cotter on the 5th day of June, 1929 * * * and on motion of J. Edward Lumbard, Jr., attorney for *the defendants*, Philip D. Gowen and William Bartels, and for Go-Bart Importing Company, Inc., it is
>
> Ordered,
>
> 1. That the United States of America, *the complainant herein*, show cause * * * why an injunction should not issue enjoining and restraining the *complainant* * * * from directly or indirectly using as evidence the papers and documents seized * * *.

> 2. That the United States of America, *the complainant herein*, show cause * * * why an order should not issue directing the return of the said papers and documents * * *.

In affidavits filed in support of the order to show cause the petitioners Gowen and Bartels each alleged "1. That he is *one of the defendants in the within action.*" (R. 3, 8.)

Following the filing of opposing affidavits by prohibition officers, affidavits in reply were filed by the petitioners Gowen and Bartels, as well as by others named as defendants in the complaint, in each of which the affiant alleged that "he is a *defendant in this action.*" (R. 33, 35, 36, 37, 38, 40, 45, 48.)

The words which we have italicized in the foregoing references to the record make clear that the motion to suppress was not the commencement of an independent proceeding, but was a motion in the proceedings begun by the complaint filed with the commissioner. The language of the order to show cause, that "Upon reading and filing the complaint herein * * *" (R. 1), indicates that the proceedings on the complaint were transferred from the commissioner to the District Court. Regarding the status of those proceedings, counsel for the petitioners in an affidavit in support of a motion for reargument in the District Court stated (R. 60):

> That your deponent further states that since the said arraignment and holding of

> the defendants in bail, no further proceedings of any kind or nature have been taken against the said defendants and that they are still being held in bail to answer the complaint before the United States Commissioner. The defendants did not waive examination upon arraignment and a date was set for a hearing on the complaint. The hearing date has been adjourned from time to time and no hearing has been held.

This is corroborated by the following statement of the Circuit Court of Appeals (R. 71):

> On the day of their arrest Gowen and Bartels were taken before the United States Commissioner and were held in bail to answer the complaint upon which the aforesaid warrant was issued. * * * Nothing further has been done in the proceeding before the commissioner.

As the sole effect of the order of the District Court was to permit the Government to use the evidence in question at the hearing on the complaint or in any other criminal proceeding which might be brought against the movants, that order did not terminate the proceedings on the complaint. It was therefore not a final decision reviewable by the Circuit Court of Appeals, at least as to the petitioners Gowen and Bartels who were named as defendants in the complaint. *Cogen* v. *United States,* 278 U. S. 221.

But the petitioner Go-Bart Importing Company, Inc., was not a party to the complaint. The motion

was made in its behalf as well as in behalf of the defendants Gowen and Bartels. The company was not a party to and can not be affected by the criminal proceeding. It would seem, therefore, that the order of the District Court appealed from, in so far as it denied the relief prayed by the Go-Bart Company, finally determined the rights asserted by that company and to that extent was a final decision reviewable in the Circuit Court of Appeals. *Ex parte Tiffany*, 252 U. S. 32; *Savannah* v. *Jesup*, 106 U. S. 563; *Gumbel* v. *Pitkin*, 113 U. S. 545; and see *Cogen* v. *United States*, *supra*, p. 225.

The grounds upon which the Go-Bart Company sought the return of its papers and the suppression of their use as evidence were identical with those advanced by the petitioners Gowen and Bartels. (R. 3–18.) If, therefore, the Circuit Court of Appeals had jurisdiction of the appeal taken by the Go-Bart Company, the question whether the search and seizure were lawful is as fully involved as though the appeal to that court had been properly taken by all the petitioners.

If, on the other hand, this Court should be of opinion that the proceedings in the District Court were not severable as to the Go-Bart Company, and that the order of the District Court denying the motion to suppress, etc., was not a final decision as to any of the petitioners, it will, without passing on the merits of the controversy, reverse

the judgment of the Circuit Court of Appeals with direction to dismiss the appeal erroneously taken to that court. *Rexford* v. *Brunswick-Balke Co.*, 228 U. S. 339, 345–346; *Blacklock* v. *Small*, 127 U. S. 96, 105; *M. C. & L. M. Railway Co.* v. *Swan*, 111 U. S. 379, 382–386; *The Assessor* v. *Osbornes*, 9 Wall. 567, 575.

STATEMENT

On June 5, 1929, a warrant for the arrest of petitioners Gowen and Bartels and others was issued by a United States Commissioner for the Southern District of New York directed to the Marshal for that district. (R. 18.) The warrant was based on a complaint of Special Agent in Charge Calhoun, of the Bureau of Prohibition, verified June 5, 1929, which charged the accused with being parties to a conspiracy to violate the National Prohibition Act, but failed to show any facts sustaining the charge or justifying the issuance of the warrant. (R. 19–21.)

Certified copies of the warrant and complaint were placed in the hands of Prohibition Agent O'Brien, who, on June 6, 1929, went to the office of the Go-Bart Importing Company, accompanied by two other agents, and arrested petitioners Gowen and Bartels, the president and secretary and treasurer, respectively, of the company. The persons of Gowen and Bartels and the offices of the company were thereupon searched and various

papers and documents seized and removed to the offices of the prohibition authorities. (R. 31–33.) Following their arrest, Gowen and Bartels were arraigned before the commissioner and, failing to waive a hearing, were held in bail for their further appearance before that officer. (R. 60, 71.)

In August, 1929, while the hearing on the complaint was still pending before the commissioner, a motion was filed in the District Court for the Southern District of New York, in behalf of the Go-Bart Company and of Gowen and Bartels, for the return of the documents and papers to the petitioners and the suppression of their use in evidence.[1] (R. 1, 3–21.) Pursuant to such motion the District Court issued an order to show cause (R. 1–2), to which affidavits were filed in response.

The affidavit of Ernest Braidwood (R. 21–28), an informer but not a Government employee, alleged that from March, 1927, to September, 1928, he dealt with petitioners Gowen and Bartels (hereinafter, for brevity, referred to as the petitioners) directly in the offices in which they were arrested, buying liquor from them, receiving instruction in the methods of conducting their business of importing and selling liquor, visiting their hidden store-

[1] Some of the documents and papers were alleged to belong to the Go-Bart Company (R. 14), but no attempt was made in the affidavits to segregate those belonging to the corporation from those of the individual petitioners, and no point was made in the petition for certiorari based on any technical ownership of the papers in the corporation.

houses, and generally being admitted to the secrets of their illicit business. The affidavit described plans of petitioners to smuggle liquors into the country and showed that petitioners formed the Go-Bart Importing Company, Inc., after the advent of prohibition, for the express purpose of handling liquor. The affidavit clearly establishes that for more than eighteen months petitioners were continuously and feloniously engaged in a conspiracy to violate the National Prohibition Act.

The affidavit of William J. Calhoun, Special Agent in Charge (R. 28–30), set forth that all these facts were communicated to him by Braidwood and that he had by independent means checked and verified them and had in turn communicated them to his subordinate, Prohibition Agent O'Brien, who made the arrests and seizure.

O'Brien's affidavit (R. 30–33) stated that he arrested petitioners in the office of the Go-Bart Company; that a search of the persons of petitioners and the immediate premises disclosed both liquors and documents vital to the conduct of the criminal enterprise; and that these were seized. No demand was made in this proceeding for the return of the liquor.

Affidavits by the two prohibition agents who accompanied O'Brien, relating the details of the arrests and the search and seizure, were also filed. (R. 50–54.)

After a hearing the District Court denied the motion for the return of the papers. (R. 54–57, 64.) A motion for rehearing was also denied. (R. 59–63, 64.) On appeal the Circuit Court of Appeals affirmed the order of the District Court except in one respect (not material here), as to which it modified the order. (R. 69–79.) This Court thereafter granted a writ of certiorari to review the judgment of the Circuit Court of Appeals. (R. 80.)

SUMMARY OF ARGUMENT

The Government concedes that the warrant of arrest, directed to the United States Marshal, conferred no authority upon Prohibition Agent O'Brien to make the arrests in this case. It submits, however, that his possession of that warrant did not deprive him of any right he otherwise had to make the arrests without a warrant.

It is a well-recognized principle of the common law that where a felony has in fact been committed a private person may without a warrant arrest one who he has reasonable ground to suspect committed it.

That the petitioners Gowen and Bartels had committed the felony of conspiring to violate the National Prohibition Act appeared from the affidavit of the informer Braidwood. Their commission of that felony was confirmed by the affidavit of Special Agent in Charge Calhoun, that he had made independent investigations which had corrob-

orated in every particular the facts stated in Braidwood's affidavit.

The "reasonable ground of suspicion" which gives the right at common law to arrest without a warrant is not the equivalent of the "probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," which will justify the issuance of a warrant under the Fourth Amendment. That constitutional provision is satisfied only by a sworn declaration of *facts within the knowledge* of the one making the oath showing probable cause to believe that the person to be arrested had committed the offense charged, or that the property to be seized is unlawfully possessed on the premises to be searched. It applies, however, only to the issuance of warrants and does not in any way impair the settled principles of the common law respecting arrests without warrants. The right at common law to arrest without a warrant for a felony actually committed is not confined to those having *personal knowledge of facts* constituting probable cause for belief that the offense was committed by the one whose arrest is contemplated. On the contrary, it is fully established that such arrests may lawfully be made upon *information* furnishing reasonable ground to suspect such guilt.

Before making the arrests in the instant case Agent O'Brien had been informed by his superior

officer, Calhoun, of facts showing that the petitioners Gowen and Bartels had committed a felony, and that those facts had been fully verified by Calhoun. O'Brien was also aware of the complaint sworn to by Calhoun, which, although legally insufficient, nevertheless afforded O'Brien additional ground for accepting as true the facts disclosed to him by Calhoun respecting the conspiracy charged in the complaint. It is submitted that the information thus possessed by O'Brien was ample to justify a reasonable suspicion on his part that Gowen and Bartels had committed the felony of conspiring to violate the National Prohibition Act, and that his arrest of those petitioners was therefore lawful.

The arrests being lawful, Agent O'Brien had the further right without a warrant contemporaneously to search the immediate premises under the control of those arrested for the "things used to carry on the criminal enterprise," and to seize any of such articles which he might find. *Marron* v. *United States*, 275 U. S. 192, 199; *Agnello* v. *United States*, 269 U. S. 20, 30. The crime for which the arrests were made was a conspiracy extending over a period of more than eighteen months and involving the continuous business of importation, purchase, sale, storage, and transportation of beverage liquors. It was a convenient, if not necessary, means for feloniously conducting this business that the conspirators keep records of their illegal transactions. The books and papers seized

were all of this character, and being used for the commission of the offense for which the arrests were made, as distinguished from mere evidence of such offense, their seizure was lawful. *Marron* v. *United States, supra.*

ARGUMENT

I

THE POSSESSION OF AN INVALID ARREST WARRANT DOES NOT RENDER ILLEGAL AN ARREST WHICH MAY LAWFULLY BE MADE WITHOUT IT

As the warrant of arrest in the possession of Agent O'Brien when making the arrests in this case was directed to the United States Marshal and had issued upon a complaint which stated no facts tending to show that the accused had committed the offense charged, the Government made no attempt below, nor does it seek here, to justify the arrests under the warrant. The evidence, which is in affidavit form, is conflicting as to whether the warrant was used at the time the arrests were made. Agent O'Brien alleged that he made no attempt to serve the warrant, but merely took it with him "for the purpose of reference as to the names of the various defendants." (R. 31, 32.) The agents who accompanied him also alleged that no warrant was served at any time. (R. 51, 53.) This is contradicted by the petitioners, who charge that O'Brien asserted that he had a search warrant and a warrant of arrest and exhibited a paper to justify a search of the offices. (R. 3, 8, 34, 35.) No return was made under the warrant. (R. 32.)

But whether the warrant was served or not is immaterial, for it is well settled that the use of a warrant which is insufficient does not render illegal an arrest or search and seizure which may lawfully be made without it. Thus, in *Stallings* v. *Splain*, 253 U. S. 339, where Stallings, having been indicted in the Federal District Court for Wyoming, was arrested in the District of Columbia by the Marshal of that district upon a bench warrant issued on the indictment to the Marshal of the District of Wyoming, this Court held the arrest to be lawful, saying (p. 342):

> If the bench warrant issued in Wyoming was not effective as a warrant within the District of Columbia, the possession of it did not render illegal an arrest which could lawfully have been made without it. It would, at least, serve as evidence that Splain had reasonable cause to believe that a felony had been committed by Stallings.

In *Marron* v. *United States*, 275 U. S. 192, the Court, although holding that the search warrant which had been served did not justify the seizure of a ledger and certain gas, electric light, water, and telephone bills, because those articles were not named in the warrant, nevertheless sustained the seizure as valid, without regard to the warrant, because incident to a lawful arrest made by the officers. See also *Vachina* v. *United States* (C. C. A. 9th), 283 Fed. 35, 36; *Fryar* v. *United States* (C. C. A. 6th), 3 F. (2d) 598; *Billingsley* v. *United*

States (C. C. A. 8th), 16 F. (2d) 754, 756; *Lee Kwong Nom* v. *United States* (C. C. A. 2d), 20 F. (2d) 470.

II

THE ARRESTS IN THIS CASE COULD LAWFULLY BE MADE WITHOUT A WARRANT

That the petitioners Gowen and Bartels had, prior to their arrests, committed the felony of conspiring to violate the National Prohibition Act, appears from the affidavit of the informer Braidwood (R. 21–28), the recitals of which the petitioners make no attempt to deny. The commission of that offense is also established by the affidavit of Special Agent in Charge Calhoun, that prior to the arrests he had made independent investigations which had corroborated in every particular the facts stated in Braidwood's affidavit. (R. 29.) It is a well recognized rule of the common law that where a felony has in fact been committed a private person, as well as a peace officer, may without a warrant arrest one who he has reasonable ground to suspect committed it. The rule is of great antiquity. Regarding its origin, Holdsworth in his "History of English Law," 1903 Ed., Vol. 1, p. 131, says:

> Under the older statutes which regulated the preservation of the peace—the Assizes of Clarendon (1166) and Northampton (1176) and the Statute of Winchester (1285)—the duty of apprehending criminals devolved upon the inhabitants at large.

> The Assize of Arms (1181) and the Statute of Winchester contained provisions which defined the arms which all free men must carry. All were obliged to pursue the criminal when the hue and cry was raised. Neglect of these duties entailed an amercement of the individual, the township, or the hundred. The sheriffs and the constables were under special obligations, as conservatores pacis, to fulfil these duties. After the jurisdiction of the justices of the peace was established these duties devolved upon them. But the statutes which defined their powers gave them no further power to apprehend criminals than that possessed by private persons. They might arrest persons actually committing, or who had actually committed a felony; or they might arrest a person if *they themselves* suspected, on reasonable grounds, that a felony had been committed.

With reference to this right of arrest, Lord Mansfield, in *Ledwith* v. *Catchpole,* Cald. Cas. 291, 294–295, said:

> The first question is, whether a felony has been committed or not? and then the fundamental distinction is, that, if a felony has actually been committed, a private person may as well as a peace officer arrest: if not, the question always turns upon this, was the arrest *bona fide*: was the act done fairly and in pursuit of an offender, or by design or malice and ill will? Upon a highway robbery being committed, an alarm spread and

> particulars circulated, and in the case of crimes still more serious, upon notice given to all the sea ports, it would be a terrible thing, if under probable cause an arrest could not be made: and felons usually are taken up upon descriptions in advertisements. Many an innocent man has been and may be taken up upon suspicion: but the mischief and inconvenience to the public in this point of view is comparatively nothing.
>
> It is of great consequence to the police of the country.

In the report of *Samuel* v. *Payne*, 1 Dougl. 359, Eng. Rep., Full Reprint, Vol. 99, p. 230, which was tried before the same great jurist, it is stated (p. 231):

> At the trial, his Lordship, and the counsel on both sides, looked upon the rule of law to be, that, if a felony has actually been committed, any man, upon reasonable probable grounds of suspicion, may justify apprehending the suspected person to carry him before a magistrate * * *.

See also remarks of Lord Tenterden in *Beckwith* v. *Philby*, 6 Barn. & Cres. 635, 638; 1 Hale P. C. 587–588; 2 Hawk. P. C., 6th ed., 118–119; 4 Bl. Com. 293.

The rule is equally well established in this country. Wharton, Crim. Law, 7th Ed., Sec. 2933; Bishop, New Criminal Procedure, 2d Ed., Sec. 181 (2). In the early New York case of *Holley* v. *Mix*, 3 Wend. 350, Chief Justice Savage, who presided, said (p. 353):

> My understanding of the law is, that if a felony has in fact been committed by the person arrested, the arrest may be justified by any person without warrant, whether there is time to obtain one or not. If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest without warrant, such arrest is illegal, though an officer would be justified if he acted upon information from another which he had reason to rely on. These principles will be found, substantially, in 1 Chitty's Crim. Law, 15.

Later the Court of Appeals of that State in *Burns* v. *Erben*, 40 N. Y. 463, said (p. 466):

> As a general principle, no person can be arrested or taken into custody without warrant. But if a felony, or a breach of the peace, has, in fact, been committed by the person arrested, the arrest may be justified, by any person, without warrant, whether there was time to procure a warrant or not; but if an innocent person be arrested upon suspicion by a private individual, such individual is not excused unless such offense has, in fact, been committed, and there was reasonable ground to suspect the person arrested.

Other State court decisions giving effect to the rule are *Reuck* v. *McGregor*, 3 Vroom. 70, 74;

Brockway v. *Crawford,* 3 Jones (N. C.) 433, 439; *Teagarden* v. *Graham,* 31 Ind. 422, 424; *State* v. *Holmes,* 48 N. H. 377, 378–379; *Commonwealth* v. *Grether,* 204 Pa. 203, 205.

The rule was plainly recognized by this Court in *Kurtz* v. *Moffitt,* 115 U. S. 487, where it was said (pp. 498–499, 504):

> By the common law of England, neither a civil officer nor a private citizen had the right without a warrant to make an arrest for a crime not committed in his presence, except in the case of felony, and then only for the purpose of bringing the offender before a civil magistrate.
>
> * * * * *
>
> The rule of the common law, that a peace officer or a private citizen may arrest a felon without a warrant, has been generally held by the courts of the several States to be in force in cases of felony punishable by the civil tribunals.

In *Brady* v. *United States* (C. C. A. 6th), 300 Fed. 540 (certiorari denied, 266 U. S. 620), where prohibition agents, having information that a distillery would be robbed and the liquor removed in described automobiles, stopped and searched the automobiles when they appeared and placed their occupants under arrest, it was contended that the arrests were illegal because prohibition agents are not peace officers or otherwise vested with authority to make arrests. The Circuit Court of Appeals held that it was unnecessary to determine whether the agents, by virtue of their official capacity, had

the right to make the arrests because under the circumstances of the case such authority inhered in them as private persons. In the course of its opinion, the court said (p. 543):

> It is well established that the right of arrest without warrant by a private person, in the absence of restrictive statutes, goes at least this far: That if a felony has in fact been committed, he may so arrest one who is committing it in his presence, or whom he has reasonable ground to suspect of having committed it. * * *
>
> In the circumstances of this case, as hereinabove set forth, a private person would have been justified in arresting the defendants, without a warrant and in taking from them the evidences of their crime, either on the ground that a felony had been committed by the unlawful taking of the whisky from the bonded distillery and that there was a reasonable basis for the belief that the defendants were guilty of this felony, or on the ground that the conspiracy to transport the liquor in violation of law was being carried out in the very view of the arresting parties and that the arrest was clearly calculated to prevent the successful consummation of the object of the conspiracy.

The authorities cited clearly establish that if Prohibition Agent O'Brien had reasonable ground to suspect that the petitioners, Gowen and Bartels, had committed a felony, his arrest of those petitioners was lawful. The petitioners insist that he

did not have such reasonable ground of suspicion because he had no *personal knowledge of facts* upon which it could be based. Their argument is based upon the theory that the "reasonable ground of suspicion" which will justify an arrest without a warrant at common law is the equivalent of the "probable cause," without which, "supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," a warrant may not lawfully issue under the Fourth Amendment.

It is doubtless true that under that Amendment a warrant, either for arrest or for search and seizure, may issue only upon a statement under oath or affirmation, either of the officer seeking the warrant or of some other person, of facts or circumstances within the knowledge of the affiant showing probable cause to believe that the person to be arrested had committed the offense charged, or that the property to be seized is unlawfully possessed on the premises to be searched. *Ripper* v. *United States* (C. C. A. 8th), 178 Fed. 24, 26; *Veeder* v. *United States* (C. C. A. 7th), 252 Fed. 414, 418; *United States* v. *Keleher* (App. D. C.), 2 F. (2d) 934, 935; *Schencks* v. *United States* (App. D. C.), 2 F. (2d) 185, 186–187; *United States* v. *Tureaud* (E. D. La.), 20 Fed. 621, 623. But these are requirements for the issuance of warrants. They were not designed to apply in cases where arrests without warrants could lawfully be made

under the settled principles of common law. It was so held by the Supreme Court of Pennsylvania, with reference to substantially identical provisions of the Constitution of that State, in *Wakely* v. *Hart*, 6 Binney 316, decided in 1814. In that case the court said (pp. 318–319):

> The provisions of this section, so far as concern warrants, only guard against their abuse by issuing them without good cause, or in so general and vague a form, as may put it in the power of the officers who execute them, to harass innocent persons under pretence of suspicion; for if general warrants are allowed, it must be left to the discretion of the officer, on what persons or things they are to be executed. But it is no where said, that there shall be no arrest without warrant. To have said so would have endangered the safety of society. The felon who is seen to commit murder or robbery, must be arrested on the spot or suffered to escape. So although not seen, yet if known to have committed a felony, and *pursued* with or without warrant, he may be arrested by any person. And even when there is only probable cause of suspicion, a *private person may* without warrant *at his peril* make an arrest. I say at his peril, for nothing short of proving the felony will justify the arrest. These are principles of the common law, essential to the welfare of society, and not intended to be altered or impaired by the constitution. The whole section indeed was nothing more than an

> affirmance of the common law, for general warrants have been decided to be illegal; but as the practice of issuing them had been ancient, the abuses great, and the decisions *against them* only of modern date, the agitation occasioned by the discussion of this important question had scarcely subsided, and it was thought prudent to enter a *solemn veto* against this powerful engine of despotism.

Of like import is the statement of the Supreme Judicial Court of Massachusetts in *Rohan* v. *Sawin*, 5 Cush. 281, 284–285:

> It has been sometimes contended, that an arrest of this character, without a warrant, was a violation of the great fundamental principles of our national and state constitutions, forbidding unreasonable searches and arrests, except by warrant founded upon a complaint made under oath. Those provisions doubtless had another and different purpose, being in restraint of general warrants to make searches, and requiring warrants to issue only upon a complaint made under oath. They do not conflict with the authority of constables or other peace officers, or private persons under proper limitations, to arrest without warrant those who have committed felonies.

See also *Snell* v. *Derricott*, 161 Ala. 259, where the Supreme Court of Alabama declared (p. 273): "It is the issue of the warrant, without oath or affirmation, that is forbidden by the Constitution, and not the arrest without a warrant."

The right at common law to arrest without a warrant for a felony actually committed is not confined to those having *personal knowledge of facts* constituting probable cause for belief that the offense was committed by the one whose arrest is contemplated. On the contrary, it is fully established that such arrests may lawfully be made upon *information* furnishing reasonable ground to suspect such guilt. Such is the plain effect of the language of Lord Mansfield in *Ledwith* v. *Catchpole*, quoted above, pp. 15–16.

Other cases in which arrests without warrants for past felonies were sustained, although the arresting officers acted upon information received by them from others, are: *Samuel* v. *Payne, supra; Brady* v. *United States, supra; King* v. *United States* (C. C. A. 9th), 1 F. (2d) 931; *White* v. *United States* (C. C. A. 9th), 16 F. (2d) 870; *Wakely* v. *Hart, supra; Burns* v. *Erben, supra; State* v. *Holmes, supra; Commonwealth* v. *Grether, supra; Commonwealth* v. *Phelps*, 209 Mass. 396; *Brish* v. *Carter*, 98 Md. 445. In the case last cited the Court of Appeals of Maryland said (pp. 449–450):

> Since the cases of *Kirk* v. *Garrett*, 84 Md. 383, *Edger* v. *Burke*, 96 Md. 715, and *B. & O. R. R. Co.* v. *Cain*, 81 Md. 87, it may be regarded as settled in this State that a peace officer may arrest without warrant, whenever he has reasonable grounds to suspect that a felony has been committed; and that it is "wholly immaterial whether the sus-

> picion arises out of information imparted to the officer by some one else, or whether it is founded on his own knowledge." * * *.

The information upon which Agent O'Brien acted in making the arrests in this case was derived from the communication to him by his superior officer Calhoun of the facts set out in the affidavit of Braidwood, as well as from Calhoun's statement to him that he, Calhoun, had by independent investigations verified the facts thus communicated. (R. 21, 30–31.) That information, coupled with his knowledge of the complaint sworn to by Calhoun which, although legally insufficient, nevertheless afforded O'Brien additional ground for accepting as true the facts disclosed to him by Calhoun respecting the same conspiracy was, we submit, ample to justify O'Brien's belief that the petitioners Gowen and Bartels had committed the felony of conspiring to violate the National Prohibition Act. Under the authorities above cited, his arrest of those petitioners without a warrant was therefore lawful.

III

THE ARRESTS BEING LAWFUL, THE CONTEMPORANEOUS SEARCH OF THE IMMEDIATE PREMISES UNDER THE CONTROL OF THE PERSONS ARRESTED AND THE SEIZURE OF THE BOOKS AND PAPERS HERE IN CONTROVERSY AS THINGS USED TO CARRY ON THE CRIMINAL ENTERPRISE WERE LIKEWISE LAWFUL

In *Carroll* v. *United States,* 267 U. S. 132, this Court defined the right to search and seize as incident to a lawful arrest as follows (p. 158):

> When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution. *Weeks* v. *United States,* 232 U. S. 383, 392; *Dillon* v. *O'Brien and Davis,* 16 Cox. C. C. 245; *Getchell* v. *Page,* 103 Me. 387; *Kneeland* v. *Connally,* 70 Ga. 424; 1 Bishop, Criminal Procedure, Sec. 211; 1 Wharton, Criminal Procedure (10th edition), Sec. 97.

In *Agnello* v. *United States,* 269 U. S. 20, upon the same subject, it said (p. 30):

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. See *Carroll* v. *United States,* 267 U. S. 132, 158; *Weeks* v. *United States,* 232 U. S. 383, 392.

In *Marron* v. *United States,* 275 U. S. 192, the Court held that the arrest made in that case was lawful and thereupon stated (p. 199):

> They [the officers making the arrest] had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise. *Agnello* v. *United States, supra,* 30; *Carroll* v. *United States,* 267 U.

S. 132, 158; *Weeks* v. *United States, supra,* 392.

Whether or not the statements quoted from the *Agnello and Marron decisions* were intended to narrow the definition given in the *Carroll case* so as to exclude the right to search for and seize mere evidence, it is at least clear from all three decisions that a lawful arrest confers the right to conduct a contemporaneous search for and to seize the things used in the commission of the crime for which the arrest was made.

The seizure complained of in the *Marron case* was of a ledger and certain bills for gas, electric light, water, and telephone service furnished the premises. In that case prohibition agents in serving a search warrant found one Birdsall in charge of premises described in the warrant which were being used at the time for retailing and drinking intoxicating liquors. The search warrant only authorized a search for and seizure of intoxicating liquors and property designed for their manufacture. The officers served the warrant on Birdsall and after placing him under arrest searched the premises and found quantities of intoxicating liquors, a ledger showing inventories of liquors, receipts, expenses, including gifts to police officers, and other things relating to the business, and also a number of bills for gas, electric light, water, and telephone service furnished on the premises. The ledger and bills, as well as the liquors, were seized, but only the liquors were covered by the search

warrant. This Court held that seizure of the ledger and bills was not authorized by the warrant, but that since Birdsall "was actually engaged in a conspiracy to maintain, and was actually in charge of, the premises where intoxicating liquors were being unlawfully sold" (p. 198), the arresting officers were authorized, in arresting him and in searching the place, to find and seize the things used to carry on the criminal enterprise. The ledger and bills were held to have been properly seized, because they were used for this purpose. In this connection this Court said (p. 199):

> And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. * * * The bills for gas, electric light, water and telephone services disclosed items of expense; they were convenient, if not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest.

So in the instant case Gowen and Bartels were lawfully arrested for conspiring to violate the National Prohibition Act and continuously conducting on the premises when they were arrested the felonious business of importation, purchase, sale, storage, and transportation of beverage liquors. Manifestly, it was a convenient, if not essential,

means of conducting such a business that the conspirators keep books and records of their illegal transactions. The books and papers which were seized are described in the affidavit of Agent O'Brien as follows (R. 32–33):

> That a further search of the said suite of rooms in which the said defendants were arrested was made and a large number of memoranda, books of account, records, filing cases and other papers were found, all of which pertained on the face thereof to unlawful dealings by the said Gowen and Bartels in intoxicating liquors. These papers included index lists with names and addresses of customers, together with amounts outstanding as payable for liquors; detailed inventories of liquors on hand, received, sold and delivered; detailed records of deliveries of intoxicating liquors to persons within the Southern District of New York and elsewhere; individual receipts for liquor deliveries signed by such customers, ledger accounts setting forth exact purchases of liquors made by particular customers, amounts due thereon, and amounts paid thereon; and letters and other correspondence having to do with the purchase, sale and delivery of intoxicating liquors.

The ledger held by this Court in the *Marron case* to be one of the "things used to carry on the criminal enterprise" which could be searched for and seized as an incident to the lawful arrest made in that case, is referred to in the opinion (p. 194) as "showing inventories of liquors, receipts, expenses,

including gifts to police officers, and other things relating to the business." This, in substance, conforms to the description above given of the books and papers seized in the present case.

To argue, therefore, that the ledger in the *Marron case* was lawfully seized, but that the books and papers in this case were not, is to assert that if the conspirators here had confined the record of their transactions to one volume, its seizure would be lawful, but that because, owing to the magnitude of their operations, their illegal dealings were recorded in a number of books and papers, the latter were immune from seizure. It is submitted that the seizure in this case can not be distinguished in principle from that in the *Marron case.*

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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NOVEMBER, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

SUPREME COURT OF THE UNITED STATES.

No. 111.—October Term, 1930.

Go-Bart Importing Co., Philip D. Gowen, and William Bartels, Petitioners,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 5, 1931.]

Mr. Justice Butler delivered the opinion of the Court.

In a criminal proceeding before a United States commissioner in the Southern District of New York in which Gowen, Bartels and others are defendants, the petitioners applied to the district court for an order enjoining the use as evidence of books and papers alleged to have been seized and taken from petitioners in violation of the Fourth and Fifth Amendments and directing their return. The court made an order that the United States show cause why the relief prayed should not be granted. The United States attorney appeared and opposed the motion, and affidavits of W. J. Calhoun, special agent in charge of special agents of the Bureau of Prohibition, and certain of his subordinates were filed in opposition. The district court denied the applications. The Circuit Court of Appeals affirmed as to the United States attorney and held that as to the special agent in charge the order to show cause should have been discharged. 40 F. (2d) 593.

Petitioners' applications to the district court, which are in form affidavits, set forth the following:

June 5, 1929, Calhoun went before the United States commissioner and, in order to have a warrant issued for the arrest of Gowen, Bartels and others, verified and filed a complaint. He alleged, upon information and belief, that beginning January 1, 1929, and continuing down to the filing of the complaint Gowen, Bartels and other defendants conspired in that district to commit a nuisance against the United States, that is to say, to possess,

transport, sell and solicit and receive orders for intoxicating liquor in violation of the National Prohibition Act, and that, in pursuance of the conspiracy and to effect its objects, one Heath purchased an automobile on May 23, 1929. See 27 U. S. C., §§ 33, 35. The complaint did not specify any building, structure, location or place or set forth any particulars or other overt act or show any connection between the purchase of the automobile and any offense referred to in the complaint. On the same day the commissioner issued a warrant in the usual form commanding the marshal of the district and his deputies to apprehend the persons so accused and to bring them before the commissioner or some judge or justice of the United States to be dealt with according to law.

On the next day Calhoun's subordinates, prohibition agents O'Brien, Collins and Sipe, went to the petitioning company's office at No. 200 Fifth Avenue. Bartels, the secretary-treasurer of the company, was there when they entered. O'Brien said he had a warrant to search the premises and exhibited a paper which he falsely claimed was such a warrant. The agents arrested Bartels, searched his person and took papers therefrom. While they were there Gowen, the president of the company, came to the office. O'Brien told him that he had a warrant for his arrest and a warrant to search the premises. The agents arrested and searched Gowen and took papers from him. They took his keys and by threat of force compelled him to open a desk and safe, searched and took papers from them, searched other parts of the office and took therefrom other papers, journals, account books, letter files, insurance policies, cancelled checks, index cards and other things belonging respectively to Gowen, Bartels and the company. For brevity these will be referred to herein as "papers".

Gowen and Bartels were on the same day arraigned before the commissioner and held on bail further to answer the complaint. A date was set for the examination, hearing has been postponed from time to time and no examination has been had. The papers so seized were taken to the office of Calhoun in the Sub-Treasury Building where they were examined by him and the United States attorney and their subordinates, and such papers have since been kept and held there, as is later herein shown, under the control of the United States attorney in the care and custody of the special agent in charge, for use as evidence against Gowen and Bartels.

Soon after the seizures were made each of the petitioners brought a suit in equity in the federal court for that district against the special agent in charge and the United States attorney, to enjoin them from using such papers as evidence and to have them returned. The court dismissed these suits on the ground that the proper remedy was by motion in the criminal proceedings.

Then Gowen and Bartels, each in his own behalf, and the company, acting through Bartels, made these applications. The court made its order that the United States show cause why an injunction should not issue restraining it and its officers from using as evidence the papers so seized and why an order should not issue directing their return.

In opposition, the affidavit of one Braidwood was submitted. It tends to show that in 1927 and 1928 petitioners and others acting together engaged in the unlawful sale of intoxicating liquor, that at the company's office they exhibited and took orders for intoxicating liquor some of which was delivered there and some elsewhere, and that in April, 1929, he reported these facts to Calhoun. Calhoun's affidavit states that Braidwood had so reported and that by independent investigations he had corroborated such statements and thus knew that a conspiracy unlawfully to sell intoxicating liquors in 1928 and 1929 had been entered into and overt acts in furtherance thereof had been performed within the district and that he believed the petitioners had been parties to such conspiracy, that prior to the day of the arrests he communicated such statements and belief to O'Brien and assigned him to further investigate the case.

O'Brien's affidavit states: From the information given him by Calhoun he believed petitioners and others had so conspired. Calhoun described to him the company's office in detail and the personal appearance of Gowen and Bartels. On June 6, 1929, he took a certified copy of the complaint and warrant "for the purpose of reference as to the names of the various defendants" and went to petitioners' office. It consisted of a suite of three rooms fitted up with office furniture including desks, filing cabinets and a safe. He told Bartels and Gowan that he was an officer of the United States and placed them under arrest for such conspiracy. No warrant was "served" upon either of them. The office was searched and there were found and taken therefrom approximately a dozen bottles of assorted intoxicating liquor, a large number of memo-

randa, books of account, records, filing cases, and other papers all of which pertained to unlawful dealings by Gowen and Bartels in intoxicating liquors.

O'Brien's affidavit also states that the papers so seized are of such quantity and bulk that it is impracticable to attach copies to the affidavit, that such papers are "specifically incorporated herein by reference and made a part hereof and are further made available for inspection at any time, if desired by the Court, in connection with the consideration of this order to show cause."

In reply to O'Brien's affidavit petitioners submitted affidavits of Gowen, Bartels and other defendants who were arrested at the company's office on that occasion and affidavits of other persons who were present during some part of the time that the prohibition agents were there. These affidavits show that O'Brien said he had a warrant of arrest and produced a paper which several of these affiants say they read and believe to be the warrant issued by the commissioner, a copy of which was filed with the moving papers. As to these details there is no conflict in the evidence.

The district court refused to sustain the contention that no use was made of the warrant and accepted the statements that O'Brien claimed to have warrants for the arrests and searches. The Circuit Court of Appeals did not definitely express opinion as to that matter. We have examined the evidence. It requires a finding that O'Brien did so claim, that he had the warrant issued by the commissioner or a copy of it and that when he arrested Gowen and Bartels he claimed and purported to act under the warrant. No warrant for the search of the premises was issued.

The orders dismissing petitioners' suits in equity are not before us. The question whether the district court had jurisdiction summarily to deal with petitioner's applications, while not brought forward by the parties, arises upon the record, was considered by the Circuit Court of Appeals and suggested during the argument here.

United States commissioners are inferior officers.[1] *United States* v. *Allred*, 155 U. S. 591, 594. *Rice* v. *Ames*, 180 U. S. 371, 377, 378. Cf. *Ex parte Hennen*, 13 Pet. 230, 257, *et seq.* The Act of May 28, 1896, 29 Stat. 184, abolished commissioners of the circuit courts, authorized each district court to appoint United States commissioners, gave to them the same powers and duties that com-

missioners of the circuit courts had, required such appointments to be entered of record in the district courts, provided that the commissioners should hold their office subject to removal by the court appointing them (28 U. S. C., § 526) and required them to keep records of proceedings before them in criminal cases and deliver the same to the clerks of the courts on the commissioners' ceasing to hold office. *Id.*, § 529. They are authorized by statute in respect of numerous matters[2] and the relations between them and the district courts vary as do their official acts. Cf. *United States* v. *Allred, ubi supra. Grin* v. *Shine*, 187 U. S. 181, 187. *Todd* v. *United States*, 158 U. S. 278, 282. *Collins* v. *Miller*, 252 U. S. 364, 369. *United States* v. *Berry*, 4 Fed. 779. *Ex parte Perkins*, 29 Fed. 900. *The Mary*, 233 Fed. 121.

We need not consider what power the district court may exert over the commissioners dealing with matters unlike that now before us. Here the commissioner acted under R. S., § 1014, which provides that for any crime or offense against the United States, the offender may by any justice or judge of the United States or by any commissioner of the circuit court to take bail (now United States commissioner) be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the

[1]As to the office of United States commissioner see: § 4, Act of March 2, 1793, 1 Stat. 334; § 1, Act of February 20, 1812, 2 Stat. 679; Act of March 1, 1817, 3 Stat. 350; §§ 1, 2, Act of August 23, 1842, 5 Stat. 516; R. S., § 627; §§ 19, 20 and 21, Act of May 28, 1896, 29 Stat. 184. United States v. Maresca, 266 Fed. 713, 719.

[2]The powers and duties of United States commissioners include: To arrest and imprison, or bail, for trial (18 U. S. C., § 591. See also §§ 593-597) and in certain cases to take recognizances from witnesses on preliminary hearings (28 U. S. C., § 657); to issue warrants for and examine persons charged with being fugitives from justice (18 U. S. C., § 651); to hold to security of the peace and for good behavior (28 U. S. C., § 392); to issue search warrants (18 U. S. C., §§ 611-627. 26 U. S. C., § 1195); to take bail and affidavits in civil causes (28 U. S. C., § 758); to discharge poor convicts imprisoned for non-payment of fines (18 U. S. C., § 641); to institute prosecutions under laws relating to the elective franchise and civil rights and to appoint persons to execute warrants thereunder (8 U. S. C., §§ 49, 50); to enforce arbitration awards of foreign consuls in disputes between captains and crews of foreign vessels (28 U. S. C., § 393); to summon master of ship to show cause why process should not issue against it for seamen's wages (46 U. S. C., § 603); to take oaths and acknowledgments. 5 U. S. C., § 92. 28 U. S. C., § 525.

United States as by law has cognizance of the offense. 18 U. S. C., § 591. All the commissioner's acts and the things done by the prohibition officers in respect of this matter were preparatory and preliminary to a consideration of the charge by a grand jury and, if an indictment should be found, the final disposition of the case in the district court. The commissioner acted not as a court, or as a judge of any court, but as a mere officer of the district court in proceedings of which that court had authority to take control at any time. *Todd* v. *United States, ubi supra. Collins* v. *Miller, ubi supra. United States* v. *Berry, supra. United States* v. *Casino,* 286 Fed. 976, 979.

Notwithstanding the order to show cause was addressed to the United States alone, this is in substance and effect a proceeding against the United States attorney and the special agent in charge. The special agent in charge was the prosecuting witness. It was his duty under the statute to report violations to the United States attorney. *Donnelley* v. *United States,* 276 U. S. 505. And he was authorized, subject to the control of the United States attorney, to "conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury". 27 U. S. C., § 11. It is immaterial whether he intended or was personally to conduct the prosecution before the commissioner. As the United States attorney had control of the prosecution before the commissioner, whether conducted by his assistants or prohibition agents, the papers were held subject to his control and direction although in the immediate care and custody of the prohibition officers. He and they voluntarily came before the court to defend the seizure, the retention and proposed use of the papers and so in effect became parties to the proceeding. By making the papers a part of O'Brien's affidavit they brought the papers within the power of the court and constructively into its possession, if indeed the papers had not already come within its reach. In so far as it purports to run against the United States, the form of the order may be treated as a mere irregularity.

The United States attorney and the special agent in charge, as officers authorized to conduct such prosecution and having control and custody of the papers for that purpose, are, in respect of the acts relating to such prosecution, alike subject to the proper exertion of the disciplinary powers of the court. And on the

facts here shown it is plain that the district court had jurisdiction summarily to determine whether the evidence should be suppressed and the papers returned to the petitioners. *Weeks* v. *United States*, 232 U. S. 383, 398. *Wise* v. *Henkel*, 220 U. S. 556, 558. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 390. *Cogen* v. *United States*, 278 U. S. 221, 225. *United States* v. *Mills*, 185 Fed. 318. *United States* v. *McHie*, 194 Fed. 894, 898. *United States* v. *Lydecker*, 275 Fed. 976, 980. *United States* v. *Kraus*, 270 Fed. 578, 580. Cf. *Applybe* v. *United States*, 32 F. (2d) 873, 874.

The Government concedes that the warrant did not authorize O'Brien or other prohibition agents to make the arrests. The complaint, which in substance is recited in the warrant, was verified merely on information and belief and does not state facts sufficient to constitute an offense. *Ex parte Burford*, 3 Cranch 448, 453. *Rice* v. *Ames*, *supra*, 374. *Byars* v. *United States*, 273 U. S. 28. *United States* v. *Cruikshank*, 92 U. S. 542, 558. *United States* v. *Hess*, 124 U. S. 483. *United States* v. *Ruroede*, 220 Fed. 210, 212, 213. The warrant was improvidently issued and invalid on its face. It does not purport to authorize anyone other than the marshal and his deputies.

The company is not mentioned in the complaint or warrant and is a stranger to the proceeding before the commissioner. Unquestionably the order of the district court as to it was final and appealable. *Cogen* v. *United States*, *ubi supra*. *Ex parte Tiffany*, 252 U. S. 32. *Savannah* v. *Jesup*, 106 U. S. 563. *Gumbel* v. *Pitkin*, 113 U. S. 545. When the application was made, no information or indictment had been found or returned against Gowen or Bartels. There was nothing to show that any criminal proceeding would ever be instituted in that court against them. *Post* v. *United States*, 161 U. S. 583, 587. And, as above shown, the complaint does not state an offense. It follows that the order of the district court was not made in or dependent upon any case or proceeding there pending and therefore the order as to them was appealable. *Cogen* v. *United States*, *ubi supra*. *Perlman* v. *United States*, 247 U. S. 7, 13. *Burdeau* v. *McDowell*, 256 U. S. 465.

Without pausing to consider the matter, we assume, as held by the lower courts, that the facts of which Calhoun and O'Brien had been informed prior to the arrests are sufficient to justify the ap-

prehension without a warrant of Gowen and Bartels for the conspiracy referred to in Braidwood's affidavit and on that basis we treat the arrests as lawful and valid.

No question is here raised as to the search of the persons. There remains for consideration the question whether the search of the premises, the seizure of the papers therefrom and their retention for use as evidence may be sustained. The first clause of the Fourth Amendment declares: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated". It is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made and the papers taken. *Gouled* v. *United States,* 255 U. S. 298, 307. The second clause declares: "and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every State in the Union. *Agnello* v. *United States,* 269 U. S. 20, 33. The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. *Boyd* v. *United States,* 116 U. S. 616, 623. *Weeks* v. *United States, supra,* 389-92.

There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances. It is not, and could not be, claimed that the officers saw conspiracy being committed. And there is no suggestion that Gowen or Bartels was committing crime when arrested. In April, 1929, Braidwood reported to Calhoun the existence of a conspiracy and that in pursuance of it sales and deliveries of intoxicating liquor had been made in 1927 and 1928. The record does not show any criminal overt act in 1929. Calhoun's description to O'Brien of the company's office in detail and of Gowen and Bartels shows

that he knew the place and offenders. Notwithstanding he had an abundance of information and time to swear out a valid warrant, he failed to do so. O'Brien falsely claimed to have a warrant for the search of the premises and he made the arrests under color of the invalid warrant. By pretension of right and threat of force he compelled Gowen to open the desk and the safe and with the others made a general and apparently unlimited search, ransacking the desk, safe, filing cases and other parts of the office. It was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found. *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 306.

Plainly the case before us is essentially different from *Marron* v. *United States*, 275 U. S. 192. There, officers executing a valid search warrant for intoxicating liquors found and arrested one Birdsall who in pursuance of a conspiracy was actually engaged in running a saloon. As an incident to the arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register. These things were visible and accessible and in the offender's immediate custody. There was no threat of force or general search or rummaging of the place.

The uncontradicted evidence requires a finding that here the search of the premises was unreasonable. *Silverthorne Lumber Co.* v. *United States, supra. Marron* v. *United States, supra*, 199. *United States* v. *Kirschenblatt*, 16 F. (2d) 202. The judgments below must be reversed and the case remanded to the district court with directions to enjoin the United States attorney and the special agent in charge from using the papers as evidence and to order the same returned to petitioners.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.